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No. 99-

IN THE

Supreme Court of the United States

S&M ENTERPRISES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Uniform Relocation Assistance and Real Property Acquisition Policies Act ("Policies Act"), 42 U.S.C. § 4653(1), and the United States Postal Service Regulation, 39 C.F.R. § 777.33, which require a condemnee to be reimbursed for transfer taxes and similar expenses necessarily incurred in a federal condemnation proceeding to acquire real property, embrace the New York State real property transfer gains tax paid by petitioner as a result of the transfer by eminent domain of its property to the United States?

2. Assuming *arguendo* the New York State real property transfer gains tax is not a transfer tax or similar expense within the meaning of the Policies Act and the Postal Service regulation, is the United States' refusal to reimburse the petitioner for this tax, which was incurred solely because of the condemnation of its property, a denial of just compensation as guaranteed by the Fifth Amendment to the United States Constitution?

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Petitioner, S&M Enterprises, requests that a writ of *certiorari* issue to review the opinion and judgment of the United States Court of Appeals for the Federal Circuit, entered on December 28, 1999, which affirmed the decision and order of the United States Court of Federal Claims, dated January 29, 1999, and the judgment entered thereon, dated January 29, 1999.

OPINIONS BELOW

The opinion of the Court of Appeals in *S&M Enterprises v. United States* is reported at 199 F.3d 1317 (Fed. Cir. 1999) and is reproduced in Appendix A. (1a).[1] The opinion of the Court of Federal Claims is reported at 43 Fed. Cl. 210 (1999) and is reproduced in Appendix B. (9a).

STATEMENT OF JURISDICTION

The Court of Appeals entered its decision on December 28, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part:

> . . . nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

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1. References to the Appendix are designated parenthetically as "__a".

Section 303 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4653, states:

> § 4653. Expenses incidental to transfer of title to United States
>
> The head of a Federal agency, as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is the earlier, shall reimburse the owner, to the extent the head of such agency deems fair and reasonable, for expenses he necessarily incurred for —
>
> (1) recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States;
>
> (2) penalty costs for prepayment of any preexisting recorded mortgage entered into in good faith encumbering such real property; and
>
> (3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the United States, or the effective date of possession of such real property by the United States, whichever is the earlier.

The applicable Postal Service regulation, 39 C.F.R. §§ 777.33(a) and (b), reads as follows:

> § 777.33 Expenses incidental to transfer of title to the Postal Service.
>
> (a) Reimbursement. When property is acquired through the exercise or the threat of the exercise of eminent domain, the owner shall be reimbursed for all reasonable expenses he or she necessarily incurred in conveying the real property to the Postal Service for:
>
> (1) Recording fees, transfer taxes, documentary stamps, evidence of title, boundary surveys, legal descriptions of the real property, and similar incidental expenses. However, the Postal Service will not pay costs solely required to perfect the owner's title to the real property.
>
> (2) Penalty costs and other charges for prepayment of any preexisting recorded mortgage, entered into in good faith, encumbering the real property.
>
> (3) The pro rata portion of any prepaid real property taxes which are allocable to the period after the Postal Service obtains title to the property or effective possession of it, whichever is earlier.
>
> (b) Direct Payment. Whenever feasible the Postal Service must pay these costs directly and thus avoid the need for an owner to pay such costs and then seek reimbursement from the Postal Service.

STATEMENT OF THE CASE

On June 29, 1987, the United States, by a Declaration of Taking filed in the United States District Court for the Southern District of New York, acquired by eminent domain petitioner's property located at 207-213 East 36th Street, New York, New York (the "Property") for continued use as a mail distribution center called the Murray Hill Postal Center. On the date of taking, the United States, pursuant to 40 U.S.C. § 258a, deposited in the Registry of the District Court $15,300,000 as estimated just compensation for the Property. The deposit was paid to petitioner without prejudice to its right to seek additional compensation in the pending condemnation case. *United States v. 17,380 Square Feet of Land*, 678 F. Supp. 443 (S.D.N.Y. 1988).

On the basis of the deposit, petitioner, S&M Enterprises, a partnership owned by Stephen and Mark Perlbinder, paid New York State in 1988, real property transfer gains tax in the amount of $958,627.30. The New York law, which was in effect from 1983 to 1996, N.Y. Tax Law Art. 31-B, §§ 1440, *et seq.* (42a), imposed upon transfers of non-residential real property valued in excess of one million dollars a ten percent tax on any gain realized by the transferor. The law defined the transfer of real property to include any "taking by eminent domain." N.Y. Tax Law § 1440.7. Similar to other transfer taxes, the transfer gains tax had the following characteristics: (1) it was triggered by the transfer and was imposed on a single transfer without regard to other transfers made by the seller during the relevant tax period; (2) it had to be paid at the time of transfer or the deed would not be recorded; (3) both the transferor and transferee under certain circumstances were liable for its payment; and (4) the amount of the tax was determined as of the date of transfer, and

interest in a condemnation ran from the date of the transfer even if payment was not made until a later date.

In 1988, S&M instituted an action in the United States Court of Federal Claims under 28 U.S.C. § 1491 seeking reimbursement of the transfer gains tax on the grounds that: (i) the transfer gains tax is a transfer tax or similar expense within the meaning of the Policies Act and Postal Service regulation; or (ii) it would be a denial of just compensation under the Fifth Amendment not to reimburse the condemnee for a tax it would not have incurred but for the condemnation. In 1989, the Claims Court deferred decision on cross-motions for summary judgment pending conclusion of the condemnation case.

Several years later the parties entered into a settlement in the condemnation case under which the United States paid S&M an additional $4,700,000, together with interest thereon of $2,373,051, for a total of $7,073,051. The judgment, which was entered in July, 1993, expressly provided that it ". . . is without prejudice to the condemnee's pursuit of the claims asserted in its action now pending in the Court of Federal Claims for reimbursement of the New York State transfer gains tax."

New York State assessed an additional transfer gains tax with respect to the settlement sum. S&M challenged the assessment, and in 1997 an Administrative Law Judge of the New York State Division of Tax Appeals held that S&M was liable for an additional tax of $96,350 (which S&M had conceded), together with interest from the date of taking to the date of payment. S&M paid New York State the sum of $243,986.34, consisting of $96,350 in additional tax and $147,636.34 in interest thereon from the date of taking to the date of payment. Thereafter S&M amended its complaint in the Court of Federal Claims to seek reimbursement of its

total transfer gains tax payments of $1,202,613.64 ($958,627.30 on December 2, 1988 and $243,986.34 on November 26, 1997), together with interest from the dates S&M made these respective payments.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO RESOLVE AN IMPORTANT ISSUE WHICH ARISES ON A REGULAR BASIS IN FEDERAL CONDEMNATIONS — WHETHER EXPENSES NECESSARILY INCURRED BY THE CONDEMNEE INCIDENTAL TO THE CONDEMNATION ARE REIMBURSABLE AS "TRANSFER TAXES" OR "SIMILAR EXPENSES" UNDER THE POLICIES ACT AND THE APPLICABLE AGENCY REGULATIONS, AND IF NOT, WHETHER THESE EXPENSES ARE REQUIRED TO BE PAID UNDER THE FIFTH AMENDMENT

The Court should grant the petition to resolve an important question of federal law which repeatedly arises in federal condemnations where condemnees have incurred expenses in connection with the taking. The Policies Act, legislation which was enacted in 1970 to provide fair, uniform and equitable treatment for federal condemnees, provides that the United States is to pay or reimburse condemnees for "transfer taxes, and similar expenses incidental to conveying such real property to the United States." 42 U.S.C. § 4653(1). The Court has not determined the scope of these terms, "transfer taxes" and "similar expenses", as they are used in the Policies Act.

Federal agencies on a fairly regular basis deal with administrative claims seeking compensation under the Policies Act, including claims seeking reimbursement for

what claimants assert are "similar expenses" under the Policies Act. The Department of Justice has acknowledged that the Postal Service and the Department of Interior Office of Hearings and Appeals, in particular, decide numerous claims involving these provisions of the Act.[2]

Many of these claims are relatively small in monetary amount, and therefore are not pursued beyond the administrative level, though, of course, the claims are quite important to the individual condemnees. However, several cases involving these provisions have been litigated. *Collins v. United States*, 946 F.2d 864 (Fed. Cir. 1991); *National R.R. Passenger Corp. v. 10,178 Square Feet of Land*, 789 F. Supp. 142 (S.D.N.Y. 1992); *Vournas v. United States*, 10 Cl. Ct. 591 (1986). In addition, at least 24 states have adopted legislation modeled on the Policies Act and provide for the condemnor to reimburse the condemnee for transfer taxes and similar expenses incidental to the condemnation. (50a). There have been some cases construing these provisions. *See Heller v. State of New York*, 81 N.Y.2d 60, 611 N.E.2d 770, 595 N.Y.S.2d 731 (1993). Though the New York tax has been repealed for transfers occurring since July, 1996, the issues presented in this case as to the scope of the Policies Act arise on a regular basis in federal condemnations and should be resolved by this Court.

In the case at bar, the Federal Circuit has adopted an unduly restrictive definition of "transfer taxes" and "similar expenses", which, unless reversed by this Court, will curtail the rights of condemnees under the Policies Act. The Federal Circuit has cut back on its own decision in *Collins*. There the appellate court held that the Policies Act included as transfer taxes or similar expenses "expenses that are customarily and necessarily paid 'in order to complete the

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2. United States' Motion to Publish, dated February 18, 1999, to the United States Court of Federal Claims in this case. (37a).

[legal] transaction' of property title transfer or to perfect the recording of the new deed." 946 F.2d at 869. In the instant case the Federal Circuit has held that even if the tax must be paid to complete title transfer and to record the new deed, the tax does not come within the Policies Act "if the tax is based solely on the *gain*, if any, and not on the *size* of the transfer." (7a).

In giving exclusive weight to the method of computing the tax, the Federal Circuit has failed to give adequate consideration and weight to the other essential characteristics of the transfer gains tax, namely that the tax: (1) was triggered by the transfer and was imposed on a single transfer without regard to other transfers made by the seller during the relevant tax period; (2) had to be paid at the time of transfer or the deed would not be recorded; (3) both the transferor and transferee under certain circumstances were liable for its payment; and (4) the amount of the tax was determined as of the date of transfer, and interest in a condemnation ran from the date of the transfer, even if payment was not made until a later date.

All of the characteristics of a tax should be examined, and not just one feature to the exclusion of the rest. When all the elements of the transfer gains tax are considered together, the tax, we submit, is a transfer tax within the meaning of the Policies Act. If not, in view of its many elements similar to a transfer tax, it is a similar expense under the Policies Act. The Federal Circuit, however, did not give separate consideration to the meaning of the term "similar expense". In effect, the court has read the concept of "similar expense" out of the Policies Act. The court's construction is contrary to the plain meaning and the purpose of the legislation.

Should this Court decide that the New York transfer gains tax is neither a transfer tax nor a similar expense reimbursable under the Policies Act, then it would be necessary to decide whether the United States' refusal to reimburse petitioner for this tax is a denial of just compensation as guaranteed by the Fifth Amendment. Petitioner incurred the tax solely because of the condemnation of its property and has been deprived of its full value at least to the extent of the amount of the tax ($1,202,614), together with interest for the period petitioner has not had the use of the money. But for the condemnation, petitioner would not have been subject to the tax.

Furthermore, because condemnation is a forced sale, a condemnee cannot negotiate with a condemnor for the condemnor to pay part or all of the transfer gains tax. By contrast, a voluntary seller in an arms-length negotiation can negotiate with a willing buyer to assume this cost of transfer. The seller's right to negotiate and have the buyer pay the tax are elements of value for which the condemnee has not been compensated. As the condemnation courts have held: "[a]ll considerations that might fairly be brought forward and given substantial weight in bargaining between an owner willing to sell and a purchaser desiring to buy should be considered and taken into account." *United States v. 1,291.83 Acres of Land*, 411 F.2d 1081, 1084 (6th Cir. 1969).

Though fully briefed, the Federal Circuit did not address the constitutional questions in its decision. These questions involving the scope of the just compensation clause are important issues of federal condemnation law. Unless petitioner is recompensed for the tax, petitioner will receive less than fair market value for the property that the United States has taken from him. Both the construction of the Policies Act and, if necessary, the constitutional issues merit determination by this Court to assure that condemnees receive fair and equitable treatment from the Government.

II.

THE NEW YORK STATE TRANSFER GAINS TAX IS A TRANSFER TAX OR A SIMILAR EXPENSE WITHIN THE MEANING OF THE POLICIES ACT AND THE POSTAL SERVICE REGULATION

A. The Purpose Of The Policies Act Is To Provide Uniform And Equitable Treatment To Federal Condemnees And Persons Affected By Federally Assisted Programs

After a decade of careful review of the various problems arising in federal condemnations and condemnations involving federally funded projects, Congress in 1970 enacted the Policies Act to establish uniform and equitable federal policies for relocation assistance and real property acquisition practices. *Norfolk Redevel. and Housing Auth.*, 464 U.S. 30, 36 (1983). As Congress explained, the purpose of the acquisition provisions is:

> to encourage and expedite acquisition by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, . . .

42 U.S.C. § 4651.

The legislative history of the Policies Act clearly reflects that Congress intended all condemnees to be treated fairly and equitably and that every condemnee is to be reimbursed for the reasonable expenses which the condemnee necessarily incurred in connection with the transfer, *i.e.*, the

condemnation, of the property to the Government. During the debate on the House floor, Representative Fallon stated:

> [This legislation] will give every citizen in the country an opportunity to get fair and equitable treatment from the Federal Government whenever any one of the many of the Federal grant or federally assisted programs move in to . . . acquire their property.

115 Cong. Rec. 40,168, 91st Cong., 2d Sess. (1970). Representative Kluezynski stated:

> The [Policies Act] is a major breakthrough in the field of providing fair treatment to all our citizens. In years to come it will be the basis for establishing for the first time across the board within the Federal Government a sound and progressive program to take care of both in an advisory capacity and in an actual financial capacity those many, many fellow citizens of ours *who through no fault of their own are forced to . . . give up real property* they have held for years because of one or another Federal program.

Id. (emphasis supplied). In further support of the legislation, Representative Annunzio stated:

> Federal programs . . . should not impose an *undue burden* upon those individuals and businesses whose properties have to be acquired to make way for the necessary improvements to benefit the rest of us.

Id. at 171 (emphasis supplied).

In partial fulfillment of not imposing undue burdens upon condemnees, Congress, as part of comprehensive legislation in the eminent domain field, expressly provided that the Government shall reimburse the condemnee ". . . for expenses he necessarily incurred for: (1) recording fees, transfer taxes and similar expenses incidental to conveying such real property to the United States . . ." 42 U.S.C. § 4653. The clear import of this provision and the implementing regulations is that a condemnee should not be required to bear an expense that arises solely upon the taking of one's property by a federal condemnation. As the Claims Court explained in *Vournas v. United States*:

> *It would be inconsistent with the statute [42 U.S.C. § 4653] to require plaintiff to bear this tax he incurred only because of the forced sale to the government through condemnation . . .*
>
> The issue is not whether plaintiff would have continued to hold his property as farmland, but whether he can recover for expenses associated with the forced sale of his property. The condemnation caused expense he did not seek but which as a party to a commercial transaction he could voluntarily anticipate and accommodate. The expense is readily compensable by a money award and public confidence in government acquisition is fostered when a seller's economic loss is redressed. This is what section 4653 is for.

10 Cl. Ct. 591, 594 (1986) (emphasis supplied).

B. The Transfer Gains Tax Possesses The Elements Of A Transfer Tax Or A Similar Expense

When one considers as a whole all the elements of the real property transfer gains tax, it is a transfer tax. In the alternative, with so many characteristics similar to a transfer tax, it is an expense similar to a transfer tax and incident to the taking, and therefore, a "similar expense" within the meaning of the Policies Act.

The characteristics of the transfer gains tax are not in dispute. The tax is imposed upon transfers of non-residential real property valued in excess of $1,000,000 at a rate of 10% of any gain realized by the transferor. Like other recognized transfer taxes, the transfer gains tax was imposed on a transaction by transaction basis, payable on transfer, without regard to other transfers made over a given period of time. The transfer was the triggering event that caused the imposition of the tax.

Moreover, the transfer gains tax, like other transfer taxes, had to be paid at the time of transfer. To implement this requirement, the New York State Department of Taxation and Finance (the "Department") established a pre-transfer audit procedure pursuant to § 1447, N.Y. Tax Law. As Jamie Woodward, an official of the Department, pointed out:

> The Department . . . has established a pre-transfer audit procedure pursuant to § 1447. In the case of a taxable transfer, both the transferor and the transferee are required to prepare and file with the Department separate questionnaires at least 20 days prior to the date of transfer. . . . At or prior to the closing, the Department is required to issue to the transferor and the transferee either a Tentative Assessment and Return or a Statement

> of No Tax Due. . . . Before a deed evidencing the transfer of the property can be recorded in those cases where the tax is due, the transferor (i) must submit to the appropriate recording officer the Tentative Assessment and Return completed by the Department of Taxation and Finance and (ii) pay the tax due.

Joint Appendix in Federal Circuit at pp. 44-45.

In 1989, the Department replaced the separate questionnaires for the transferor and the transferee with new forms. Reflecting the similar characteristics of the transfer gains tax and the New York State transfer tax contained in Article 31 of the New York Tax Law, the Department issued a single form for both these taxes. It is noteworthy that both the transferor and the transferee were required to sign this form and affirm its accuracy.

Most significantly, the statute expressly stated that the county clerk could not record or accept for recording any conveyance of real property without payment of the tax or compliance with the law. Section 1447.1(f)(1) provided:

> (f)(1) *A county clerk or register of a county shall not record or accept for record any conveyance*, other than a conveyance by a court of appropriate jurisdiction, or an officer thereof, resulting from an action to foreclose a mortgage, *of real property in New York State, . . . unless accompanied by*:
>
> (i) *the statement of tentative assessment of the amount of tax* or statement that no tax is due provided pursuant to subdivision two of this section, *together with the payment of the tentative assessment of the amount of tax*, if any. . . .

(46a) (Emphasis supplied). The New York Real Property Law § 333(1-f) implemented this provision:

> A recording officer shall not record or accept for record any conveyance of real property in New York State unless the requirements of paragraph (f) of subdivision one of section fourteen hundred forty-seven of the tax law, relating to the [transfer gains tax], are satisfied.

The transferee was also jointly liable with the transferor for the transfer gains tax under certain circumstances. If the tax was applicable, as we have seen, the transferee prior to the transfer was issued a Statement of Tentative Assessment and Return setting forth the amount of the tax due. Upon receipt, the transferee was not to transfer to the transferor any "sums of money, property or consideration to the extent of the amount of the [tax due] stated in such tentative assessment." Tax Law § 1447.3(a). If the transferee failed to comply with that provision, the statute provided the transferee "shall be personally liable for the payment to the state of any such taxes stated in such tentative assessment to be due to the state from the transferor." *Id.* The transferee's personal liability was further explained in New York State regulations at 20 N.Y.C.R.R. § 590.72 (52a), formerly 20 N.Y.C.R.R. § 590.70 (50a).

Of necessity, the pre-transfer filings by the transferor and the transferee, the Department's assessment, and the payment of the transfer gains tax before the recording of the deed did not apply to a condemnation. Here, respondent acquired the property by filing a declaration of taking and depositing with the District Court the Government's estimate of the value of the property pursuant to 40 U.S.C. § 258a. As in this case, a condemnee, however, customarily would not know or receive the full amount of the transfer, *i.e.*, the amount of the condemnation award, until some time later.

Consistent with the principle that the transfer gains tax was payable at the time of transfer, New York courts have held that in a condemnation case, interest on the unpaid tax is payable from the date of taking, *i.e.*, the date of transfer, even if the condemnee did not know the full amount of the award or receive payment until a later date. *In re Forty Second St. Co. v. Tax Appeals Tribunal*, 219 A.D.2d 98, 641 N.Y.S.2d 151 (3rd Dept.), *leave to appeal denied*, 88 N.Y.2d 807, 670 N.E.2d 448, 647 N.Y.S.2d 164 (1996). In the case at bar, for example, the ultimate amount of the award was not determined and petitioner did not receive full payment until the summer of 1993, six years after the taking. However, the Department required that interest be paid from the date of taking.

C. Though The Amount Of The Tax Is Calculated On The Amount Of The Gain, It Is A Transfer Tax Or Similar Expense Because Of Its Other Essential Characteristics

In holding that the tax is not a transfer tax or similar expense, the Federal Circuit gave controlling weight to the provision that "the tax is based solely on the *gain*, if any, and not on the *size* of the transfer." (7a). However, the method of computing the tax is not determinative. In the case at bar, the tax arose only because of the involuntary transfer of the property to respondent through condemnation. But for the condemnation, there would have been no transfer and hence no tax. In short, the transfer gains tax is a condemnation-caused expense within the language and purpose of the Policies Act and the Postal Service regulation. It is an expense that S&M "necessarily incurred in conveying the real property to the Postal Service . . ." 39 C.F.R. § 777.33(a).

The Policies Act and the Postal Service regulation by the use of the plural — "transfer taxes" — provide for the reimbursement of more than one transfer tax that may be assessed by a taxable entity. Thus there may be, as New York State had, one transfer tax measured by the amount of the transfer, and another transfer tax measured by the amount of the gain. A transfer tax is no less a transfer tax because it applies only to a certain class of transfers. For example, a transfer tax is no less a transfer tax because it applies only to commercial property and not to both commercial and residential property.

Moreover, the fact that the transfer gains tax was computed on the amount of the gain (although without a reduction for depreciation) does not alter the fact that the tax possessed the essential characteristics of a transfer tax or similar expense — (i) the tax was imposed on a single transfer without regard to other transfers by the seller during the applicable tax period; (ii) the seller or the buyer was required to pay the tax at the time of transfer or the deed would not be recorded; (iii) both transferor and transferee under certain circumstances were liable for the payment of the tax; and (iv) the amount of the tax is determined as of the time of transfer, and interest on the unpaid part of the tax runs from the date of the transfer.

Consequently, the formula for the computation of the transfer gains tax did not convert a tax which was otherwise a transfer tax or a similar expense into a capital gains or income tax. In sum, the transfer gains tax is a transactional tax and meets the test for a transfer tax within the meaning of the Policies Act set forth by the Federal Circuit in its earlier decision in *Collins v. United States*, 946 F.2d 864, 869 (Fed. Cir. 1991) — the transfer gains tax was a tax "customarily and necessarily paid 'in order to complete the [legal] transaction' of property title transfer or to perfect the recording of the new deed."

D. The Tax Is Not A Capital Gains Tax

There are basic differences between the transfer gains tax and a capital gains tax. The capital gains tax is computed on the aggregate of the taxpayer's various gains and losses in both real and personal property transactions during the taxable period. Accordingly, a capital loss will offset a capital gain for that tax year. *See* Internal Revenue Code ("I.R.C.") § 1222. Moreover, a taxpayer may be able to offset gains with capital loss carrybacks and carryforwards from other tax years. I.R.C. § 1212. By contrast, the transfer gains tax treats each transfer separately.

Other basic distinctions include:

(a) A capital gains tax is payable following the close of the taxpayer's tax year when the applicable tax return is due, while the transfer gains tax is payable at the time of each transfer and as a prerequisite for the recording of the transfer.

(b) Both the transferor and the transferee were liable under certain circumstances for the payment of the transfer gains tax while only the transferor is liable for the payment of its capital gains tax.

(c) The basis of the transfer gains tax was not reduced by depreciation or amortization while depreciation or amortization is allowed in computing the capital gains tax.

(d) Under the transfer gains tax, a legatee or heir did not receive a "stepped-up" basis on the original purchase price but carried over the original purchase price of the donor. Tax Law § 1440.5(b). This contrasts with the federal tax system which permits a legatee a "stepped-up" basis in the property. I.R.C. § 1014(a).

(e) Congress, recognizing the various hardships condemnation is likely to cause an owner, has conferred special treatment on condemnees with respect to income or capital gains taxes. Section 1033 of the I.R.C. provides that, in general, if a condemnee invests the proceeds of the condemnation in property of like kind within the taxable year of the taking or the succeeding two taxable years, no income tax or capital gains tax is payable on the gain from the condemnation. The tax is deferred, and the new property acquires a basis corresponding to that of the old property. I.R.C. § 1033. Section 208.9 of New York's Tax Law tracks the Internal Revenue Code in this respect. Because the transfer gains tax is not an income or gains tax, it is not afforded this treatment. It would be anomalous if the transfer gains tax were the only tax immediately payable by S&M as a result of the condemnation.

E. If The Tax Is Not A Transfer Tax, Then It Is An Expense Similar To A Transfer Tax For Purposes Of The Policies Act

The transfer gains tax qualifies not only as a "transfer tax" within the meaning of § 4653(1), but also, assuming *arguendo* the tax is not a transfer tax, as a "similar expense incidental to conveying . . . real property to the United States; . . ." 42 U.S.C. § 4653(1). The Federal Circuit held that because "the tax is solely against the gain, and not against the conveyance" (7a), the tax is not incidental to the condemnation.

This analysis disregards that the sole event giving rise to the tax was the condemnation. Absent the Government's exercise of its eminent domain power, there would have been no transfer. The fact that the measure of the tax was a portion of the gain does not diminish the fact it was imposed because the Government required a transfer of the property from

S&M. The imposition of the tax, therefore, was subordinate to and dependent on the conveyance of the property to the United States. As such, the tax was incidental to the condemnation.

Moreover, the tax was an expense required to be paid to complete the transfer of title. In a voluntary transaction, the buyer could not obtain freely alienable title until the tax was paid and the deed recorded. Thus, for this reason as well, the payment of the tax was a necessary incident to the conveyance of the property. In a condemnation, the United States acquires title by filing the Declaration of Taking, which substitutes for the recording of the deed. However, the State of New York required payment of the tax and interest from the date of taking.

Furthermore, the Federal Circuit did not give sufficient weight to the meaning of the word "similar". The word has been defined as: "Showing some resemblance; alike though not identical". *The American Heritage Desk Dictionary* (1981). In view of the great number of common characteristics shared by the traditional transfer tax and the transfer gains tax, the latter is a similar expense within the meaning of the Policies Act.

F. The New York Court Of Appeals Decision In *Heller* Does Not Apply to A Federal Condemnation

In *Heller v. State of New York*, 81 N.Y.2d 60, 611 N.E.2d 770, 595 N.Y.S.2d 731 (1993), the New York Court of Appeals ruled that the transfer gains tax is not a transfer tax within the meaning of § 702(A)(1) of the New York Eminent Domain Procedure Law ("EDPL"), which requires a condemnor to reimburse a condemnee for certain "incidental expenses," including "transfer taxes and other similar expenses in connection with the acquisition of the property by the condemnor . . ."

Heller does not foreclose this Court from concluding that the transfer gains tax is a transfer tax or similar expense for purposes of the Policies Act. As this Court held in *Society for Savings v. Bowers*, 349 U.S. 143, 151 (1955): " 'Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.' " (*quoting Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)). Furthermore, it is well established that federal law may preempt and replace state law where necessary to protect federal proprietary rights, *i.e.*, when a uniform federal rule is needed to prevent the rights and duties of the United States from varying from state to state where important federal policies are involved. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943).

The legislative history of the Policies Act reflects that the statute was intended to establish "a *uniform* policy for the fair and equitable treatment of persons who . . . have their real property taken for Federal . . . programs." H.R. 91-1656, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 5850 (emphasis added). "It establishes a *uniform* policy on real property acquisition practice for all Federal . . . programs." *Id.* at 5852 (emphasis added). Allowing the interpretation of the words of the statute to depend on varying state law would be inconsistent with the intent to establish uniformity for federal real property acquisition practice and would revert to the inconsistencies that previously existed. In this case, application of state law would frustrate federal objectives.

Heller is also distinguishable because of the differences in the pertinent language of § 4653(1) of the Policies Act and E.D.P.L. § 702(A)(1). The latter statute requires reimbursement for "incidental expenses" paid by the

condemnee in connection with the condemnation. The Policies Act requires the condemnee to be reimbursed "for expenses he necessarily incurred for . . . transfer taxes and similar expenses incidental to conveying such real property to the United States." § 4653(1). Under the Policies Act, the word "incidental" means "in connection with" and is not the equivalent of "inconsequential" or "insignificant."

We also note that in *In re 995 Fifth Avenue Associates*, 963 F.2d 503 (2nd Cir.), *cert. denied*, 506 U.S. 947 (1992), the Second Circuit held that the transfer gains tax was not a "stamp tax or similar tax" which the debtor in a Chapter 11 bankruptcy proceeding was exempt from paying pursuant to 11 U.S.C. § 1146(c). The Second Circuit reversed the decisions of the District Court, 127 B.R. 533 (S.D.N.Y. 1991), and the Bankruptcy Court, 116 B.R. 384 (Bankr. S.D.N.Y. 1990), both of which, we believe, provide persuasive reasons why the tax is a transfer tax or similar expense. In any event, the Second Circuit's decision construing a provision of the Bankruptcy Act is not controlling in applying the Policies Act.

III.

IF NOT REIMBURSED UNDER THE POLICIES ACT, RESPONDENT IS ENTITLED TO BE REIMBURSED UNDER THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT

Should the Court uphold the denial of recovery to petitioner under the Policies Act, it would be necessary to decide S&M's constitutional claim that it has been denied just compensation to the extent that its net recovery as a result of the condemnation has been reduced by the amount of the transfer gains tax it is out-of-pocket.

A condemnee is in a fundamentally different position than other transferors. Condemnation is an involuntary taking. S&M had no interest in selling the property to the Government, certainly not at the price offered by the Government. Otherwise, S&M would have entered into a sale in lieu of condemnation. As a result of the taking, S&M paid a tax in excess of $1,200,000 that it otherwise would not have incurred. Unless S&M prevails in this litigation, it will be deprived of the full value of its property.

Unlike a condemnee, a voluntary seller in an arms-length transaction can negotiate with a willing buyer for the buyer to pay part or all of the transfer gains tax. As the Federal Circuit explained: "Nothing compelled the sellers to close if they disagreed with the final terms." *Boekeloo v. Hodel*, 828 F.2d 727, 732-733 (Fed. Cir. 1987). If a prospective buyer were sufficiently interested in the property, no doubt it would have agreed to pay part or all of the tax. Indeed, the New York State Department of Taxation and Finance recognized that buyers may agree to pay the tax and promulgated a regulation to cover this situation. The regulation, 20 N.Y.C.R.R. 590.9, provides that the transferee's payment constitutes taxable consideration and sets forth a formula for calculating the increase in the tax due. (58a).

Thus, the seller's right to negotiate and have the buyer pay the transfer gains tax are elements of value that are available to a willing seller in an arms-length transaction. In this sense, the amount of the tax was an element of market value of S&M's property on the date of taking. In a condemnation "[a]ll considerations that might fairly be brought forward and given substantial weight in bargaining between an owner willing to sell and a purchaser desiring to buy should be considered and taken into account." *United States v. 1,291.83 Acres of Land*, 411 F.2d 1081, 1084 (6th Cir. 1969).

CONCLUSION

For all the foregoing reasons, this Court should issue a writ of *certiorari* to the United States Court of Appeals for the Federal Circuit to review the important federal question here presented and, following such review, reverse the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND DECIDED DECEMBER 28, 1999

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

99-5061

S&M ENTERPRISES,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: December 28, 1999

Before MICHEL, SCHALL, and BRYSON, *Circuit Judges*.

MICHEL, *Circuit Judge*.

This is an appeal from the January 29, 1999 decision of the United States Court of Federal Claims granting summary judgment in favor of the government. *See S&M Enters. v. United States*, 43 Fed. Cl. 210 (1999). Plaintiff-Appellant S&M Enterprises ("S&M") was the owner of the property located at 207-213 East 36th Street, New York, New York ("the Property"). On June 29, 1987, the United States acquired the Property through eminent domain by filing a Declaration of Taking in the United States District Court for

the Southern District of New York. The New York State Department of Taxation and Finance assessed a transfer gains tax on S&M. S&M filed a claim for reimbursement under the Uniform Relocation Assistance and Real Property Acquisition Policies Act ("Policies Act"), 42 U.S.C. § 4653(1) (1994), claiming that this tax was a "transfer tax or similar expense." The Court of Federal Claims found that this tax was an income tax and not a transfer tax or similar expense, and, therefore denied S&M's claim for reimbursement. Because we agree that a tax based on gains is not a transfer tax or similar expense, we affirm.

BACKGROUND

This case was initially filed in the Court of Federal Claims on September 23, 1988, however, due to a long and complicated procedural history, which is detailed in the Court of Federal Claims decision, no judgment was issued until January 29, 1999. *See S&M*, 43 Fed. Cl. at 210-20. The case was timely appealed to our court and submitted for our decision following oral argument on December 8, 1999.

The only issue currently before this court is whether the transfer gains tax assessed against S&M[1] after its property

---

1. S&M was taxed under Article 31-B of the New York State Tax Law, entitled "Tax Gains Derived From Certain Real Property Transfers." In relevant sections, it provides:

> § 1440 Definitions
>
> 1. (a) "Consideration" means the price paid or required to be paid for real property or any interest therein, less

(Cont'd)

Appendix A

(Cont'd)

any customary brokerage fees related to the transfer if paid by the transferor, including payment for an option or contract to purchase or use real property.

. . . .

3. "Gain" means the difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price.

. . . .

7. (a) "Transfer of real property" means the transfer of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property.

§ 1441. Imposition of tax

1. A tax is hereby imposed on gains derived from the transfer of real property within the state. The tax shall be at the rate of ten percent of the gain.

§ 1442. Payment of tax

(a) General. The tax imposed by this article shall be paid by the person liable for the tax to the commissioner of taxation and finance, or to any agent of such

(Cont'd)

was acquired by the government can be classified as a "transfer tax or similar expense" within the meaning of the Policies Act. Under the Policies Act, the government is required to reimburse a property owner whose property has been taken pursuant to the government's eminent domain powers for "expenses he necessarily incurred for . . . recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States." 42 U.S.C. § 4653(1).

(Cont'd)

> commissioner appointed pursuant to [§ 1449(b)] of this article, no later than the fifteenth day after the date of transfer. Any payment of this tax subsequent to [March 28, 1983,] and prior to [July 1, 1989,] and made no later than the fifteenth day after the date of transfer shall be deemed to have been paid on the date of transfer . . . .
>
> § 1447. Filings and procedures.
>
> 1. (f)(1) A county clerk or register of a county shall not record or accept for record any conveyance, other than a conveyance by a court of appropriate jurisdiction, or an officer thereof, resulting from an action to foreclose a mortgage, or real property in New York state . . . unless accompanied by:
>
> > (i) the statement of tentative assessment of the amount of tax or statement that no tax is due provided pursuant to subdivision two of this section, together with the payment of the tentative assessment of the amount of tax, if any . . . .

Appendix A

ANALYSIS

The Federal Circuit has examined a similar issue once before in a case involving the Vermont Land Gains Tax. *See Collins v. United States*, 946 F.2d 864 (Fed.Cir. 1991). That case interpreted the language "transfer taxes, and similar expenses" as used in 42 U.S.C. § 4653 to be limited to the "set of expenses that are customarily and necessarily paid 'in order to complete the [legal] transaction' of property title transfer or to perfect the recording of the new deed." *Id.* at 869 (quoting 35 Fed. Reg. 19232, 19243 (1970)). In that case, this court held that the Vermont Land Gains Tax bore no relationship to the acts of completing legal title transfer or recording the new deed, and therefore it was neither a transfer tax nor a similar expense. The court thoroughly expounded on the minimal legislative history available to reach the conclusion that the Policies Act did not cover the Vermont Land Gains Tax, stating that "the traditional nature of a locality's property transfer taxes [renders them] . . . generally due at settlement or before the property transfer transaction can be given legal effect." *Id.* We held that since the "title transfer is recorded regardless of payment" of the Vermont Land Gains Tax, which is distinguishable from Vermont's Property Transfer Tax due at "the time of delivery to the clerk for recording of a deed evidencing a transfer of title to property subject to the tax," the Vermont Land Gains Tax cannot be considered a transfer tax, or similar expense "because the tax bears no relationship to the acts of completing legal title transfer or recording of the new deed." *Id.*

Appendix A

In the instant case, New York State, as Vermont did in the *Collins* case, implemented a real estate tax "on each deed at the time it is delivered by a grantor to a grantee when the consideration or value of the interest conveyed exceeds one hundred dollars. . . ." N.Y. Real Prop. Tax Law, Art. 31, §§ 1400-1410 (McKinney Supp. 1983-84). In 1989, Article 31 was amended. Section 1402, as amended, provided in relevant part:

> A tax is hereby imposed on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof; provided, however, that with respect to (A) a conveyance of a one, two or three-family house and an individual residential condominium unit, or interests therein; and (B) conveyances where the consideration is less than five hundred thousand dollars, the consideration for the interest conveyed shall exclude the value of any lien or encumbrance remaining thereon at the time of conveyance.

N.Y. Real Prop. Tax Law § 1402(a) (McKinney 1994). Payment of the transfer tax imposed by Article 31 is required prior to deed recordation, and the tax is paid through the purchase of documentary stamps or through the use of a metering machine. The real estate tax is a tax designed merely to cover the costs of the actual transfer, including the costs of recording the deed, and other administrative tasks the government must do to perfect the transfer. The New York State transfer gains tax is a separate tax designed to raise

revenue, not to merely offset expenses, and is taxed at the rate of ten percent on the gains earned on the transfer. We held in *Collins* that the policy behind the Policies Act was to reimburse unwilling conveyors of their property only for those expenses "incidental to conveying such real property to the United States" — not with the profits they may earn from the transfer. It is clear that in the instant case, the New York State transfer gains tax is not merely a fee to cover such incidental costs, and is therefore, not meant to be reimbursed under the Policies Act.

S&M argues that the fact that the tax is on the gains is only one factor to be considered in determining whether the tax is a "transfer tax, or similar expense." We disagree, and hold that regardless of the many different factors that may come into play, such as when the tax is due, or who is responsible for the tax, if the tax is based solely on the *gain*, if any, and not on the *size* of the transfer, it is never a "transfer tax, or similar expense" and, therefore, never reimbursable under the Policies Act. In a case, such as this one, where if there had been a loss incurred in the transfer no New York transfer gains tax would have been due, the tax is solely against the gain, and not against the conveyance, the tax cannot be a "transfer tax, or similar expense." It is, instead, merely a tax on the gain, and therefore, not reimbursable.

It does not matter, in the instant case, that section 1447(1)(f)(1)(i) of the New York State transfer gains tax prohibits the recording of the deed until the gains tax, if due, is paid, that liability for the tax can, in certain limited circumstances, be imposed on both the seller and the buyer, and that the tax is imposed simultaneously with the *transfer*.

Appendix A

The dispositive factor is that the tax is assessed against any profit earned, and not assessed against the size of the conveyance made.

CONCLUSION

The summary judgment in favor of the government, holding that S&M is not entitled to reimbursement for the amount assessed under the New York State Transfer Tax and paid by S&M, is therefore,

AFFIRMED.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF FEDERAL CLAIMS DATED AND FILED JANUARY 29, 1999

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 561-88C

(Filed: January 29, 1999)

S & M ENTERPRISES,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

ORDER

Plaintiff's claim presents the issue of whether the former New York State Tax on Gains Derived from Certain Real Property Transfers (NYS transfer gains tax)[1] is a "transfer tax" or a "similar expense" within the meaning of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (Policies Act).[2] Defendant acquired

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1. N.Y. TAX LAW ART. 31-B §§ 1440, *et seq.*, *repealed by*, effective July 13, 1996, New York Laws of 1996, ch. 309, § 171 (McKinney 1987 & Supp. 1997).

2. 42 U.S.C. §4653(1) (1994).

by eminent domain on June 29, 1987, plaintiff's property in New York City, which was used as a mail distribution center called the Murray Hill Postal Center.[3] The case is before the court on cross motions for summary judgment. All briefing has been completed and no material fact is in dispute. Oral argument is not necessary.

Procedural Status

Proceedings have been extended and complex. The initial complaint, filed September 23, 1988, sought a declaratory judgment; defendant filed a motion to dismiss pursuant to RUSCC 12(b)(1) and (h)(3) on November 22, 1988; plaintiff filed a cross motion for summary judgment on January 23, 1989; briefing on the motions was completed on March 10, 1989.

The case was reassigned to this judge on October 2, 1989. After oral argument on the motions, the order filed November 29, 1989, noted that facts relevant to the motions had changed during the briefing period. Although at the time the complaint was filed declaratory relief on the claim was not available in this court, and the court lacked subject matter jurisdiction because the New York State Department of Taxation and Finance (NYS Taxation Department) had not determined any amount of tax due under the NYS transfer gains tax, this defect was cured by the NYS Taxation Department by its November 30, 1988, determination of tax due in the amount of $958,627.30, and by the December 2, 1988, payment of that amount by plaintiff.

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3. *United States v. 17,380 Square Feet of Land. Etc.*, 87 Civ. 4635 (S.D.N.Y.) (July 26, 1993).

Appendix B

The November 29, 1989, order declared the court had jurisdiction of the subject matter under RUSCC 12(b)(1) and converted defendant's motion to dismiss to a motion for summary judgment pursuant to RUSCC 12(b)(4). The order also (1) authorized the parties to file additional memoranda on the cross motions for summary judgment; (2) authorized plaintiff to amend its complaint to reflect the then present factual posture; and (3) in order to avoid piecemeal resolution of plaintiff's claim, deferred decision on the cross motions for summary judgment until there was a final amount claimed for reimbursement.

The first amended complaint was filed on December 14, 1989. It recited that the NYS transfer gains tax had been calculated on defendant's deposit of $15,300,000 in the condemnation proceeding, that plaintiff had paid the $958,627.30 assessed on December 2, 1988, and asserted a right to reimbursement pursuant to the Policies Act, Postal Service regulations, and the just compensation clause of the Fifth Amendment.

During the period November 29, 1989, to June 15, 1990, plaintiff's request for reconsideration of the November 29, 1989, order relative to piecemeal resolution of plaintiff's claim, and plaintiff's motion for certification of an interlocutory appeal were briefed and considered. During this period there had been no final determination of the amount plaintiff was required to pay under the NYS transfer gains tax or the amount of plaintiff's claim for reimbursement under the Policies Act. By order dated April 23, 1990, plaintiff's motion for reconsideration of the November 29, 1989, order was denied; by order dated June 15, 1990,

plaintiff's motion for certification of an interlocutory appeal was denied.

Proceedings on the cross motions for summary judgment continued to be deferred. On August 25, 1993, plaintiff's status report advised that the condemnation action in the district court in the Southern District of New York, after trial on April 19-22, 1993, had been settled by a consent judgment filed on July 29, 1993. The consent judgment ordered that just compensation for the condemnation was $22,373,051.00. The consent judgment noted that the Government had deposited $15,300,000.00 estimated compensation, which had been paid out pursuant to orders dated August 25, 1987, and February 26, 1988. The Government was ordered to pay an additional $7,073,051.00 to plaintiff condemnee.

On August 24, 1993, plaintiff notified the NYS Taxation Department of the additional payment it had received in the condemnation action. Plaintiff's October 17, 1994, status report noted that no decision had been reached in the NYS administrative proceedings on the NYS transfer gains tax, with the result that plaintiff did not know the full amount of its claim in this case.

Plaintiff's February 15, 1995, status report noted that the NYS Taxation Department on November 25, 1994, had determined that plaintiff was liable to pay an additional $470,000.00, with interest of $435,791.44, for a total of $905,791.44, under the NYS transfer gains tax. Plaintiff advised that it had decided to challenge this determination and had taken the initial administrative step of filing a request

for a conciliation conference with the NYS Taxation Department. Plaintiff advised that, if necessary, it intended to seek judicial relief after exhaustion of its administrative remedies. Plaintiff suggested status reports at six month intervals. This suggestion was accepted by order filed March 7, 1995.

Plaintiff's August 4, 1995, status report stated plaintiff was awaiting notice from the NYS Taxation Department as to the date on which the conciliation conference would be held, and requested direction as to when it should submit its next status report. By order dated August 9, 1995, plaintiff was directed to file a status report at six month intervals until completion of all administrative or legal challenges of the determination of liability for NYS transfer gains tax.

Plaintiff's February 9, 1996, status report stated the conciliation conference in the NYS administrative proceeding had been concluded on October 30, 1995. The conciliation conference was unsuccessful and the conciliation process was concluded by order dated January 5, 1996. Plaintiff stated it would seek further administrative review and would file a petition with the NYS Division of Tax Appeals for a redetermination by an administrative law judge of the assessment made by the NYS Taxation Department. Should that decision be adverse to plaintiff, plaintiff (but not the NYS Taxation Department) could seek judicial review in the NYS Supreme Court.

During the period February 15, 1995, to January 13, 1998, plaintiff submitted status reports at six month intervals. The January 13, 1998, status report stated the dispute in the

administrative proceeding had been resolved on October 30, 1997, on terms conceded in part by plaintiff. The ruling by the administrative law judge provided that plaintiff was liable for an additional $96,350.00 in transfer gains tax, with interest from the June 29, 1987, date of taking to the date of payment. Plaintiff had conceded liability as to the additional $96,350.00. The NYS Taxation Department advised plaintiff it would accept the ruling and would not appeal to the NYS Division of Tax Appeals. Plaintiff also decided not to appeal to the Tax Appeals Tribunal, and on November 26, 1997, paid the sum of $243,986.34, consisting of $96,350.00 in additional tax and $147,636.34 in interest.

On January 22, 1998, a schedule was established by order (1) for additional briefing to supplement papers applicable to the November 29, 1989, cross motions for summary judgment, (2) for plaintiff to file a motion to amend the complaint, and (3) for briefing thereon. By order dated April 3, 1998, plaintiff's motion to file an amended complaint to update the amount of its claim to reflect the final amount paid, and to assert a new claim based on the theory of an implied-in-fact contract, was allowed.

The Second Amended Complaint was filed April 17, 1998. Briefing on the cross motions for summary judgment was completed on May 27, 1998.

Material Facts

1. Plaintiff S&M purchased on August 4, 1982, in fee simple absolute, the property located at 207-213 East 36th Street New York, New York, including the buildings and improvements

erected thereon (the Property). Plaintiff owned the Property immediately prior to the condemnation on June 29, 1987.

2. Since at least 1972 the United States Postal Service had leased the Property, including the five-story 103,424 square-foot building thereon, for use as a mail distribution center called the Murray Hill Postal Center.

3. On June 29, 1987, defendant United States acquired the Property through eminent domain by filing a Declaration of Taking in the United States District Court for the Southern District of New York. On the date of the taking, defendant deposited $15.3 million as estimated just compensation for the condemnation of the Property. This amount was paid to the condemnee pursuant to orders dated August 25, 1987, and February 26, 1988. In further proceedings, S&M and the government stipulated, and on July 29, 1993, the District Court adopted, that just compensation for the taking was $22,373,051.00, inclusive of interest. Plaintiff has been paid the additional $7,073,051.00 pursuant to the July 29, 1993, order.

4. The New York State Department of Taxation and Finance assessed S&M $958,627.30 under the NYS transfer gains tax. Plaintiff paid that sum on December 2, 1988. On the basis of the final award in the condemnation proceeding, the NYS Department of Taxation and Finance assessed an additional transfer gains tax of $470,000.00, with interest of $435,791.44 from the date of the taking, June 29, 1987. In further administrative proceedings, the NYS transfer gains tax liability was established to be an additional $96,350.00, with interest from the date of taking to the date of payment.

Appendix B

On November 26, 1997, plaintiff paid New York State $243,986.34, consisting of $96,350.00 in additional tax and $147,636.34 in interest thereon.

5. Plaintiff's initial complaint was filed on September 23, 1988, and a first amended complaint was filed on December 14, 1989. The Second Amended Complaint, filed on April 17, 1998, supplements and supercedes the initial and first amended complaints.

6. Plaintiff's claim in this court is for reimbursement of the total payments pursuant to the NYS transfer gains tax of $1,202,613.64 ($958,627.30 on December 2, 1988, and $243,986.34 on November 26, 1997), together with interest from the dates plaintiff made these respective payments. Plaintiff's claim for reimbursement for its payments pursuant to the NYS transfer gains tax is based on the Policies Act,[4] Postal Service regulations,[5] and the just compensation clause of the Fifth Amendment to the United States Constitution.[6] In addition plaintiff seeks reimbursement for attorney fees, fees of expert witnesses, and related expenses incurred in connection with the New York State tax matter in the amount of approximately $310,000.00 for benefit conferred to defendant under a contract implied-in-fact.

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4. 42 U.S.C. § 4653(1) (1994).

5. 39 C.F.R. § 777.33(a)(1), (b) (1987).

6. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

Appendix B

DISPOSITION

Plaintiff's primary claim is that it is entitled to reimbursement under the Policies Act for the amounts paid to New York State pursuant to the NYS transfer gains tax. If there is no entitlement to reimbursement, there can be no Fifth Amendment taking, nor any indemnity for breach of an alleged implied-in-fact contract.

Disposition of plaintiff's claims has been complicated because the initial complaint was filed prematurely, with the result that this case essentially has been stayed during the period November 29, 1989, to January 22, 1998, to permit the completion of litigation needed to resolve the condemnation amount for the Murray Hill property and to resolve the administrative dispute with the NYS Tax Department regarding the final amount of the NYS transfer gains tax. During this period, S&M supplemented its information and made additional arguments as to the basis and extent of its claim. Further, S&M changed positions it had advanced in materials filed previously.

The initial complaint was filed before plaintiff had been assessed any amount for the NYS transfer gains tax; it sought declaratory relief not available in this court. The first amended complaint cured these defects by seeking (1) reimbursement for the sum of $958,627.30 paid on the basis of defendant's deposit of $15.3 million in the condemnation proceeding, (2) remand to the Postal Service with direction to pay directly to the NYS Tax Department any additional NYS transfer gains tax, and (3) reimbursement for a Fifth Amendment taking. The second amended

complaint increases the amounts to be reimbursed and adds a claim for reimbursement under a contract implied-in-fact for attorney fees, fees of expert witnesses, and related expenses in the NYS administrative proceedings.[7]

The nearly ten year stay period, in part, is attributable to the inability of the parties to isolate by stipulation the

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7. Similarly, S&M's January 23, 1989, memorandum of law, p. 21, and its March 10, 1989, reply memorandum, p. 7, argued the Vermont land gains tax was comparable to be NYS transfer gains tax, and IRS Rev. Ruling 80-121, 1980-1 C.B. 43 that the Vermont tax should be followed because it was a transfer tax rather than a Federal capital gains tax or income tax under I.R.C. § 164(a). After *Collins v. United States*, 946 F.2d 864 (Fed.Cir. 1991) affirmed the judgment of this court that the Policies Act did not require reimbursement of the Vermont gains tax, however, S&M argued that the Federal Circuit relied on "two features of the Vermont statutory scheme that materially differ from the NYS transfer gains tax." Plaintiff's March 25, 1998, supplemental brief, p. 6; *see also*, defendant's May 6, 1998, response, pp. 17-19.

Another example is found in the Second Amended complaint. The proposed draft, attached to the February 17, 1998, motion to amend, did not include in the second claim (¶¶ 23-27) an allegation that defendant's acceptance and retention of the benefit of a reduction in its obligation to reimburse constitutes a ratification giving rise to an implied promise to pay. After defendant's March 12, 1998, response to the motion to amend, however, S&M in its March 30, 1998, reply, p. 7 n.1, stated: "The allegations set forth in this paragraph are not contained in the proposed pleading annexed to plaintiff's motion papers. If the motion is granted, plaintiff will include these allegations in the amended complaint it serves."

The "ratification" allegation is contained in ¶ 27 of the Second Amended complaint.

issues of law applicable to construction of the Policies Act, and the issues of law applicable to construction of the NYS transfer gains tax.[8] Inability to stipulate as to applicable issues of law was complicated by S&M's continued assertions of its intent to resolve contested factual determinations by further administrative and legal appeals.

Reimbursement — Policies Act

Summary judgment under RCFC 56(c) shall be rendered forthwith "if the pleadings, depositions, answers and interrogatories, and admissions on file, together will the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." The nonmoving party, under RCFC 56(f), by affidavits or as otherwise provided in the rule "must set forth specific facts showing there is a genuine issue for trial."

Summary disposition is appropriate to isolate and dispose of factually unsupported claims or defenses and there are no genuine disputes as to any material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed.Cir. 1987). The movant has the burden of demonstrating that there are no genuine issues of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). After adequate time for discovery and on motion, the movant can meet this

8. *See* papers related to the April 23, 1990, order denying S&M's motion for reconsideration of piecemeal resolution of its claim; and papers related to the June 15, 1990, order denying S&M's motion for certification of an interlocutory appeal.

burden by establishing that there is an absence of evidence on an essential element of the non-movant's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1563 (Fed.Cir. 1987). The fact that there are cross-motions for summary judgment does not mean the court must grant judgment as a matter of law for one side or the other. Each party's motion must be evaluated on its own merits. All reasonable inferences must be drawn against the party whose motion is under consideration. *Mingus Constructors, Inc.*, 812 F.2d at 1391. The non-movant must respond by producing affirmative evidence that a genuine issue of material fact does exist, and such an issue is determined to be genuine if a reasonable jury could resolve a factual matter in the non-movant's favor. *Sweats Fashions, Inc.*, 833 F.2d at 1562. Doubts as to whether there are material factual issues in dispute are to be resolved in the light most favorable to the party opposing the motion for summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). "In order to defeat a motion for summary judgment, the non-moving party must demonstrate more than some metaphysical doubt as to the material facts, instead it must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

In this case, there has been more than adequate time for discovery. There are no facts in dispute that are material to defendant's motion for partial summary judgment.

Appendix B

Statutory Provisions

The statutory provision in the Policies Act[9] that requires the Government to reimburse a property owner whose property has been taken pursuant to the Government's eminent domain powers for "transfer taxes" that the condemnee has been required to pay states:

> The head of a Federal agency, as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is the earlier, shall reimburse the owner, to the extent the head of such agency deems fair and reasonable, for expenses he necessarily incurred for —
>
> > (1) recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States.

The United States Postal Service, had issued its own regulations[10] to implement the Policies Act:

> (a) *Reimbursement.* When property is acquired through the exercise or the threat of the exercise

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9. 42 U.S.C. § 4653(1) (1994).

10. 39 C.F.R. § 777.33(a), (b) (1987).

of eminent domain, the owner shall be reimbursed for all reasonable expenses he or she necessarily incurred in conveying the real property to the Postal Service for:

> (1) Recording fees, transfer taxes, documentary stamps, evidence of title, boundary surveys, legal descriptions of the real property, and similar incidental expenses. However, the Postal Service will not pay costs solely required to perfect the owner's title to the real property. . . .

(b) *Direct Payment.* Whenever feasible the Postal Service must pay these costs directly and thus avoid the need for an owner to pay such costs and then seek reimbursement from the Postal Service.

S&M asserts that Article 31-B of the NYS Tax Law, entitled "Tax Gains Derived From Certain Real Property Transfers" constitutes a transfer tax reimbursable under the Policies Act and Postal Service regulations. The NYS transfer gains tax, in relevant sections, provides:

§1440. Definitions

1. (a) "Consideration" means the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor, including

payment for an option or contract to purchase or use real property. . . .

3. "Gain" means the difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price.

7. (a) "Transfer of real property" means the transfer of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property. . . .

§1441. Imposition of tax

1. A tax is hereby imposed on gains derived from the transfer of real property within the state. The tax shall be at the rate of ten percent of the gain.

§1442. Payment of tax

(a) General. The tax imposed by this article shall be paid by the person liable for the tax to the commissioner of taxation and finance, or to any agent of such commissioner appointed pursuant to [§ 1449(b)] of this article, no later than the

fifteenth day after the date of transfer. Any payment of this tax subsequent to [March 28, 1983,] and prior to [July 1, 1989,] and made no later than the fifteenth day after the date of transfer shall be deemed to have been paid on the date of transfer. . . .

§1443. Exemptions

A total or partial exemption shall be allowed in the following cases:

1. If the consideration is less than one million dollars; provided, however, for the purpose of the application of this exemption only, consideration shall be deemed to also include . . . .

§1447. Filings and procedures

1. (f)(1) A county clerk or register of a county shall not record or accept for record any conveyance, other than a conveyance by a court of appropriate jurisdiction, or an officer thereof, resulting from an action to foreclose a mortgage, of real property in New York state . . . unless accompanied by:

> (i) the statement of tentative assessment of the amount of tax or statement that no tax is due provided pursuant to subdivision two of this section, together with the payment of the tentative

> assessment of the amount of tax, if any. . . .[11]

Separate from the NYS transfer gains tax, New York State has a real estate transfer tax.[12] On June 29, 1987, Article 31, Section 1401 provided in relevant part:

> A tax is hereby imposed on each deed at the time it is delivered by a grantor to a grantee when the consideration or value of the interest conveyed exceeds one hundred dollars. . . .

In 1989, L.1989, c. 61, § 182 amended Article 31. Section 1402, as amended, provided in relevant part:

> **Imposition of Tax**
>
> A tax is hereby imposed on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof; provided, however, that with respect to (A) a conveyance of a one, two or three-family house and an individual residential condominium unit, or interests therein; and (B) conveyances where the consideration is less than five hundred thousand dollars, the

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11. N.Y. TAX LAW, ART. 31-B, §1447(1)(f)(1)(i) (McKinney 1987).

12. N.Y. REAL PROP. TAX LAW, ART. 31, §§ 1400-1410 (McKinney Supp. 1983-84).

> consideration for the interest conveyed shall exclude the value of any lien or encumbrance remaining thereon at the time of conveyance.[13]

Payment of the transfer tax imposed by Article 31 is required prior to deed recordation, and the tax is paid through the purchase of documentary stamps or through the use of a metering machine. Section 1403, Payment of Tax, provides:

> **Payment of Tax**
>
> (a) The real estate transfer tax shall be paid either by the purchase of adhesive documentary stamps from the tax commission or any person designated as its agent for purposes of this article, or through the use of metering machines by the tax commission and such agents. In addition to or in lieu of the foregoing methods, the tax commission, by regulation, may prescribe any other method for payment of the tax, as long as such method includes a procedure under which payment of the tax is noted on the deed or if no tax is due, such a notation is placed on the deed. The tax commission shall have power and is hereby authorized to provide by regulation which of such methods shall be used and may authorize the use of one or more of such methods.
>
> (b) Documentary stamps shall be affixed to the deed and canceled before the deed is recorded.

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13. N.Y. REAL PROP. TAX LAW §1402(a) (McKinney 1994).

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Documentary stamps shall be canceled by the person affixing them to the deed, writing or stamping on each stamp his initials and the date on which the stamps are affixed.

(c) If the tax is paid through the use of a metering machine or by any other method which the tax commission, by regulation, may provide, the tax shall be paid before the deed is recorded. The tax commission shall have power and is authorized to provide by regulation the manner in which the tax imposed by this article shall be paid through the use of metering machines.

(d) A recording officer shall not record a deed unless the real estate transfer tax shall have been paid as provided in this section.[14]

Scope

The Policies Act provides for uniform acquisition procedures when a federal agency condemns real property. This requires interpretation of the scope of the statutory language that requires the Government to reimburse the owner for transfer taxes and similar expenses incidental to conveying real property to the United States, and analysis of agency regulations that implement the Act. Neither the Policies Act nor the Post Office regulations expressly include a gains tax in the list of reimbursable expenses. The Court

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14. N.Y. REAL PROP. TAX LAW §1403 (McKinney Supp. 1983-84).

of Appeals for the Federal Circuit in *Collins*,[15] reviewed the legislative history of the Policies Act and found "no indication of the intended scope of 42 U.S.C. §4653(1)." 946 F.2d at 867.[16] The Federal Circuit concluded:

> Finally, the fact that the enacted statute categorically enumerates various reimbursable expenses, rather than providing for consequential losses or an accounting for damages, creates a presumption that Congress intended to limit reimbursement to the listed categories.

946 F.2d at 868.

Collins involved the Vermont Land Gains Tax. The Federal Circuit concluded that the enumerated category in the Policy Act for reimbursement describes, and is limited to, a set of expenses that are customarily and necessarily paid "in order to complete the [legal] transaction" of property title transfer or to perfect the recording of the new deed. As a result, the Vermont Land Gains Tax was found to be neither a transfer tax nor a similar expense because the tax bears no relationship to the acts of completing legal title transfer or recording the new deed, and, additionally, because Vermont expressly made the tax a continuing personal liability of the seller after the transfer of title had been effected. 946 F.2d at 869.

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15. *Collins v. United States*, 946 F.2d 864 (Fed.Cir. 1991).

16. The legislative history and the text of the Federal Aid Highway Act of 1968, which was repealed by the Policies Act, on which the Policies Act provision on reimbursement for transfer taxes was modeled, did not provide assistance. 946 F.2d at 867 n.4.

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S&M describes various features of the NYS transfer gains tax to evidence its similarity to a transfer tax. S&M argues that the NYS transfer gains tax is a transfer tax because a deed would not be recorded until the tax was paid, and because both the buyer and seller was liable for the tax.

S&M states that, prior to 1989, the transferor of property was primarily liable for the NYS transfer gains tax, with the transferee only "secondarily liable for the [tax] if [the transferee] failed to withhold the tax from the sums paid to the transferor as consideration for the transfer." However, S&M asserts that, in 1989, subparagraphs 8 and 9 of section 1440 of the NYS transfer gains tax were added "to impose primary liability for the tax on the transferee as well as the transferor," making it more like a transfer tax.

S&M has misstated the scope of the transferee's potential liability for the tax. S&M's analysis of the scope of the 1989 amendments to Article 31-B is flawed. Under section 1447(3) of the NYS transfer gains tax, the transferee is never liable for the gains tax, except in very limited circumstances arising (1) when the transferor and transferee "fail to give such pertinent affidavits and other information to the [NYS Taxation Department] as required by this section," or (2) after the NYS Taxation Department notifies the transferee that a tentative assessment of the gains tax exists and, despite this knowledge, the transferee subsequently transfers sums of money to the transferor. N.Y. TAX LAW §1447(3)(a) (McKinney 1987). As a result, the transferee was never primarily liable for the unpaid tax, absent the circumstances identified in the statute.

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The transferee's limited potential liability for the unpaid tax did not change in 1989. Although subparagraphs 8 and 9 were added to section 1440 in 1989, those paragraphs did not in any way expand the transferee's liability. The 1989 amendment simply added the term "person liable for the tax," and defined it as meaning a person who is personally liable for the tax whether as a transferor or as a transferee pursuant to paragraph (a) of subdivision three of Article 31-B, section 1447. The 1989 amendment did not amend section 1447(3). Instead, section 1447(3) continued to provide for transferee liability only in those limited circumstances described above. S&M's attempt to make the law appear to place equal liability upon the transferor and the transferee is incorrect.

S&M distinguishes the Vermont and New York gains taxes by arguing section 1447(1)(f)(1)(i) of the NYS transfer gains tax prohibits the recording of a deed until the gains tax is paid and liability for the tax is imposed on both the buyer and seller. The Court of Appeals of New York has interpreted the NYS transfer gains tax payment provision to be distinct from the traditional NYS transfer tax provision, which requires payment of the actual tax before recording.[17] The distinction being that the NYS transfer gains tax requires the payment of the tentative amount of the tax at the time of recordation, and the NYS transfer tax requires the payment of the actual amount of the tax prior to recordation. Furthermore, the NYS transfer gains tax, unlike the transfer tax, can be paid in installments in certain circumstances. N.Y. TAX LAW § 1442(c).

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17. *Heller v. State of New York*, 611 N.E.2d 770 (N.Y. 1993).

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In *Heller*, the Court of Appeals of New York found that a comparison of the NYS transfer gains tax with the NYS transfer tax strongly evidenced that the NYS transfer gains tax was not a transfer tax.

> The tax on gains derived from real property transfers is "imposed on gains derived from the transfer of real property within the state . . . [and is imposed] at the rate of ten percent of the gain" (Tax Law §1441). The real estate transfer tax in Tax Law § 1402, on the other hand, bears a direct relationship to the consideration paid for the property, and is "imposed on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof." Thus, the real property transfer gains tax bears little similarity to a real estate transfer tax.

611 N.E.2d at 771-72.

The Policies Act creates a presumption that Congress intended to limit reimbursement to the listed categories. If the NYS transfer gains tax is more like an income tax than a transfer tax, then, arguably, Congress intended to exclude it from reimbursement. A transfer tax is a "tax imposed by states on each deed conveying real estate. The tax is paid by the seller." BLACK'S LAW DICTIONARY 1498 (6th ed. 1990). An income tax is "a tax on a person's income, wages, salary, commissions, emoluments, profits and the like, or the excess thereof over a certain amount." *Id.* at 764.

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One court has ruled on whether the NYS transfer gains tax is more like an income tax under the Policies Act.[18] *National R.R. Passenger* found the NYS transfer gains tax was more like an income tax because the gains tax is not assessed on the total value of the property, but rather, on the difference between the consideration received and the cost.[19] Traditional transfer taxes are assessed on the value of the property. In excluding the NYS transfer gains tax from reimbursement, the court determined that the tax was contingent on the profitability of the property transfer, unlike traditional transfer taxes which are contingent on transferability of the property.

Other courts have noted the distinction between the rate of assessment on typical transfer taxes and the NYS transfer gains tax. *995 Fifth Ave.*, 963 F.2d at 513; *Heller*, 611 N.E.2d 770 (N.Y. 1993). The NYS transfer gains tax rate is ten percent of the profit. The transfer tax rate is two dollars for every five hundred dollars of consideration or value. Assuming property that cost $500,000 is sold for $1,000,000, the transfer tax due is $4,000 and the transfer gains tax due is $50,000. The significant difference in the two tax rates demonstrates that the NYS transfer gains tax is more like an income tax than a transfer tax which traditionally is assessed

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18. *National R.R. Passenger Corp. v. 10,178 Sq. Feet of Land*, 789 F.Supp. 142, 143 (S.D.N.Y. 1992).

19. The district court relied on *In re 995 Fifth Ave. Assoc., L.P. v. New York State Dep't of Taxation and Finance*, 963 F.2d 503 (2d Cir. 1992), *cert. denied*, 506 U.S. 947 (1992) (which held the NYS transfer gains tax was not a stamp or similar tax within the bankruptcy code).

at "about one percent or less of the consideration." *995 Fifth Ave.*, 963 F.2d at 513. S&M notes that New York City imposes a transfer tax of 2.65 percent for transfers over $500,000. The New York City transfer tax is not claimed by S&M as a transfer tax or similar expense and properly is not a factor in a comparison with the NYS transfer gains tax.

Similar Expense

S&M claims that, even if the NYS transfer gains tax is not a transfer tax, it is a "similar expense" that is "incidental to" the transfer. S&M reads the phrase "and similar expenses" in a vacuum. It argues that similar expenses should be read to mean any expenses incurred by the seller in the conveyance of its property to the Government. The term "similar expenses" clearly refers directly to expenses similar to the enumerated ones. If Congress had intended to compensate property owners for all of their expenses, including the transfer gains tax at issue here, the regulation and statute would have so specified. Instead, both the Policies Act and the Postal Service implementing regulation clearly and directly aim to compensate the transferors only for those expenses incidental to the transfer.

The Policies Act does not reimburse the transferor for all expenses incurred in the sale or transfer of real property. Instead, the various reimbursable expenses are limited to those that the Policies Act categorically enumerates. The Postal Service's implementing regulation expressly limits recoverable costs to a specific listing of items eligible for reimbursement. The Postal Service regulations are consistent with the standards recommended by the Department of Transportation for use under the Policies Act.

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A "similar expense" must be "incidental to" the transfer. The term "incidental" means "having reference to something which is subordinate to and dependent upon and follows the existence of another and principal thing," or "depending upon or appertaining to something else as primary."[20] The NYS transfer gains tax is not "incidental to" the transfer of the property, but instead is, at best, "incidental to" a realized capital gain. The gains tax is not an expense of conveyance, but a tax on the realization of an increase in the value of the capital asset.

The basic characteristics of the NYS transfer gains tax are consistent with an income tax. Because Congress excluded acquisition income tax consequences from the list of reimbursable expenses, the NYS transfer gains tax is not a transfer tax or similar expense.

Other Claims

In the Second Amended Complaint, S&M acknowledged that the implied-in-fact contract claim is contingent upon a showing that the Government had an obligation to pay the NYS transfer gains tax. Similarly, if there is no showing of entitlement to reimbursement of the payments made to the NYS Taxation Department, there is no entitlement to just compensation for a Fifth Amendment taking as alleged in the Second Amended Complaint, ¶ 8. Because the NYS transfer gains tax is not a transfer tax or similar expense under the Policies act, S&M is unable to demonstrate that the payments it made to the NYS Taxation Department were the obligations of the Government.

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20. *Stark v. Brannan*, 82 F.Supp. 614, 618 (D.D.C. 1949), *aff'd*, 185 F.2d 871 (D.C.Cir. 1951), *aff'd*, 342 U.S. 451 (1952).

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On the basis of review of the complete record and the foregoing analysis, defendant is entitled to judgment,

IT IS ORDERED:

1. Defendant's motion for summary judgment is allowed.

2. Plaintiff's motion for summary judgment is denied.

3. The Clerk is directed to enter judgment for defendant and dismiss the complaint.

4. Costs to defendant.

s/ Kenneth R. Harkins
Kenneth R. Harkins, Senior Judge

Appendix B

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 561-88C

S & M ENTERPRISES,

v.

THE UNITED STATES

JUDGMENT

Pursuant to the court's Order, filed January 29, 1999, allowing defendant's motion for summary judgment and denying plaintiff's motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. Costs to defendant.

Margaret M. Earnest
Clerk of Court

January 29, 1999

By: s/ [illegible]
Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES COURT OF FEDERAL CLAIMS DATED AND FILED MARCH 15, 1999 AND DEFENDANT'S MOTION TO PUBLISH DATED FEBRUARY 18, 1999

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 561-88C

(Filed: March 15, 1999)

Uniform Relocation Assistance and Real Property Acquisition Policies Act; Transfer Taxes and Similar Expenses; 42 U.S.C. § 4653(a)

S & M ENTERPRISES,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

ORDER

IT IS ORDERED:

The attached Order was filed on January 29, 1999. It is being reissued for publication at the request of defendant pursuant to RCFC 52.1(b).

s/ Kenneth R. Harkins
Kenneth R. Harkins, Senior Judge

Appendix C

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 561-88C
(Senior Judge Harkins)

S & M ENTERPRISES, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO PUBLISH

Pursuant to Rule 52.1(b), the United States respectfully requests that the decision issued in this case on January 29, 1999, be published in commercial reporting services to facilitate public access to this Court's thorough discussion and explanation of its rationale behind one of the legal issues addressed in that decision. The agency involved in this case, the United States Postal Service, has specifically requested that we seek publication of this decision, for the reasons explained below.

In its January 29, 1999 decision in this case, this Court considered the meaning and application of the terms "transfer tax" and "similar expenses," as those terms are used in the Uniform Relocation Assistance and Real Property

Acquisition Policies Act ("the Act"). Several courts have issued decisions interpreting the meaning of the term "transfer tax" under the Act, including the United States Court of Appeals for the Federal Circuit, *see Collins v. United States*, 946 F.2d 864 (Fed. Cir. 1991), and this Court's January 29, 1999 decision is consistent with those prior opinions.

However, prior to the Court's January 29, 1999 decision in this case, no Federal or state court has ever addressed, at least not in a published opinion, the meaning of the term "similar expenses" under the Act. In its January 29, 1999 order, this Court considered and rejected plaintiff's argument that the term refers to any expenses incurred by the seller in the conveyance of its property to the Government in a condemnation. This Court found that the term " 'similar expenses' clearly refers directly to expenses similar to the enumerated ones" in the Act, that "a 'similar expense' must be 'incidental to' the transfer," and that a state tax "incidental to" a realized capital gain rather than the transfer of the property would not constitute a "similar expense." Order, at 14.

Only a few cases involving the "transfer tax" and "similar expense" provisions of the Act have previously been filed in this Court. However, the United States Postal Service deals with administrative claims seeking compensation under the Act on a fairly routine basis, including claims seeking compensation for what claimants assert are "similar expenses" under the Act. The Department of Interior Office of Hearings and Appeals also hears and decides numerous claims involving these provisions of the Act. The United

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States Postal Service has informed us that, given its obligation fully to evaluate and consider monetary claims submitted to the agency pursuant to the Act, it would be of great assistance if the agency had court guidance to which it could refer and cite in deciding administrative claims seeking monies under the "similar expenses" provision of the Act. Since no other Federal or state court of which we are aware has previously dealt with this issue, at least not in a published decision, publication of this Court's decision regarding the proper meaning and application of this term in the Act would provide agencies dealing with administrative claims under the Act with useful and necessary guidance in resolving such claims.

For the foregoing reasons, defendant respectfully requests that the opinion issued in this case on January 29, 1999, be published.

Respectfully submitted,

DAVID W. OGDEN
Acting Assistant Attorney General

s/ David M. Cohen
DAVID M. COHEN
Director

Appendix C

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February 18, 1999

APPENDIX D — RELEVANT SECTIONS OF NEW YORK STATE'S REAL PROPERTY TRANSFER GAINS TAX

The relevant sections of the New York State transfer gains tax, New York Tax Law Article 31-B, §§ 1440, *et seq.*, repealed by New York Laws of 1996, ch. 309, § 171, effective July 13, 1996 (McKinney's 1987 & 1999-2000 Interim Supplementary Pamphlet), are:

§ 1440. Definitions

In this article:

1. (a) "Consideration" means the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor, including payment for an option or contract to purchase or use real property. Consideration includes any price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property, or any other thing of value and including the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether the underlying indebtedness is assumed or taken subject to. Consideration includes the cancellation or discharge of an indebtedness or obligation.

3. "Gain" means the difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price.

Appendix D

5. (a) "Original purchase price" means the consideration paid or required to be paid by the transferor; (i) to acquire the interest in real property, and (ii) for any capital improvements made or required to be made to such real property, including solely those costs which are customary, reasonable, and necessary, as determined under rules and regulations prescribed by the commissioner, incurred for the construction of such improvements. Original purchase price shall also include the amounts paid by the transferor for any customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property and those customary, reasonable and necessary expenses incurred to create ownership interests in property in cooperative or condominium form, as such fees and expenses are determined under rules and regulations prescribed by the tax commission.

7. "Transfer of real property" means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property. . . .

9. "Person liable for the tax" means a person who is personally liable for the tax whether as a transferor or as a transferee pursuant to paragraph (a) of subdivision three of section fourteen hundred forty-seven of this article.

Appendix D

§ 1441. Imposition of tax

1. A tax is hereby imposed on gains derived from the transfer of real property within the state. The tax shall be at the rate of ten percent of the gain.

§ 1442. Payment of tax

(a) General. The tax imposed by this article shall be paid by the person liable for the tax to the commissioner of taxation and finance, or to any agent of such commissioner appointed pursuant to [§ 1449(b)] of this article, no later than the fifteenth day after the date of transfer. Any payment of this tax subsequent to [March 28, 1983,] and prior to [July 1, 1989,] and made no later than the fifteenth day after the date of transfer shall be deemed to have been paid on the date of transfer. . . .

§ 1443. Exemptions

A total or partial exemption shall be allowed in the following cases:

1. If the consideration is less than one million dollars; provided, however, for the purpose of the application of this exemption only, consideration shall be deemed to also include:

(a) In the case of a transfer of an option, or in the case of a transfer or an acquisition of a controlling interest in an entity which owns such an option, the amount to be paid for the real property pursuant to the option agreement being transferred.

(b) In the case of an assignment of a contract to purchase real property, or in the case of a transfer or acquisition of a controlling interest in an entity which owns such a contract, the amount required to be paid for the real property pursuant to the terms of the contract being transferred.

(c) In the case of an assignment of a lease by the lessee, or in the case of a transfer or an acquisition of a controlling interest in an entity which is a lessee of a lease, the value of the remaining rental payments required to be made pursuant to the terms of such lease.

§ 1447. Filings and procedures

1. (a) The commissioner of taxation and finance shall make available forms which he shall prescribe, to be completed by each transferor and transferee for each transfer for which an affidavit is not prescribed in clause (ii) of subparagraph one of paragraph (f) of this subdivision occurring after the effective date of this article.

(b) On the form prescribed for a transferor, the transferor shall set forth the following information: the original purchase price including the consideration paid by the transferor for any capital improvements made to such property, the party or parties to whom such original purchase price was paid, the consideration to be paid by the transferee, the amount of any brokerage fees to be paid and the party or parties to whom such fees will be paid and the anticipated tax due.

(c) On the form prescribed for a transferee, the transferee shall set forth the following information: the consideration paid to the transferor and the amount of any brokerage fees to be paid by him.

(d) Such forms shall be filed with the state tax commission in accordance with the pre-transfer audit procedure established by the commissioner of taxation and finance pursuant to subdivision two of this section.

(f)(1) A county clerk or register of a county shall not record or accept for record any conveyance, other than a conveyance by a court of appropriate jurisdiction, or an officer thereof, resulting from an action to foreclose a mortgage, of real property in New York state . . . unless accompanied by:

(i) the statement of tentative assessment of the amount of tax or statement that no tax is due provided pursuant to subdivision two of this section, together with the payment of the tentative assessment of the amount of tax, if any. . . .

2. The department of taxation and finance shall make available as soon as practicable a pre-transfer audit procedure to be applicable to all transfers subject to tax under this article. Pursuant to such procedure, the department shall determine a tentative assessment of the tax to be levied hereunder. When the transferor and the transferee shall have furnished pertinent affidavits and any other information necessary to determine such tentative assessment at least twenty days prior to the date of transfer, such department

shall provide the transferor and transferee with a statement of tentative assessment of the amount of tax, or a statement that no tax is due, at or prior to the date of closing and, if such affidavits and information are furnished within such period, such department shall provide such statement as soon as practicable, but not later than twenty days from the date such affidavits and other information have been furnished to the tax commission. The tentative assessment of the amount of tax due shall not be deemed to be a determination of the actual amount of tax due.

3. (a) Whenever the transferor or transferee shall fail to give such pertinent affidavits and other information to the department of taxation and finance as required by this section, or whenever such department shall inform the transferee that a tentative assessment of such tax exists, any sums of money, property or other consideration, which the transferee is required to transfer over to the transferor shall be subject to a first priority right for any such taxes stated to be due from the transferor to the state in such tentative assessment, and (except as provided in paragraphs (b) and (c) of this subdivision) the transferee is forbidden to transfer to the transferor any such sums of money, property or consideration to the extent of the amount of the state's claim stated in such tentative assessment, whether or not the transferor has represented to, or informed the transferee that, he owes any tax pursuant to this article, and whether or not the transferee has knowledge that such taxes are owing, and whether any such taxes are in fact owing. Whenever the department shall fail to give such statement of a tentative assessment of such tax to the transferor and the transferee, within twenty days from receipt of such pertinent affidavits

and such other information, such failure will release the transferee from any further obligation to withhold any sums of money, property or other consideration, which the transferee is required to transfer over to the transferor; except that with respect to matters pending on the effective date of this article such twenty day period shall not begin to run until ninety days after the effective date of this article. For the transferee's failure to comply with the provisions of this subdivision, the transferee (except as provided in paragraphs (b) and (c) of this subdivision) shall be personally liable for the payment to the state of any such taxes stated in such tentative assessment to be due to the state from the transferor; provided, however, in a case where no tentative assessment has been issued because the transferee did not file the required questionnaire, or the transferee supplies willfully false or fraudulent information, the transferee shall be personally liable for the taxes stated to be due in a notice of determination, except that the liability of the transferee shall be further limited to the sums of money, property or other consideration which the transferee is required to transfer over to the transferor, and such liability may be assessed and enforced in the same manner as the liability for tax under this article. Upon receipt of such statement of tentative assessment mailed or delivered within the twenty days as aforesaid of the notice of the stated amount of the state's claim from the department, and demand for payment thereof, the transferee may make payment of such claim to the state from any sums of money, property, or consideration withheld in accord with the provisions of this paragraph, except that such payment shall be limited to the sums of money, property or other consideration which the transferee is required to transfer over to the transferor, and upon making the payment,

such transferee shall be relieved of all liability for such amounts to the transferor, and such amounts paid to the state shall be deemed satisfaction of the tax liability of the transferor, to the extent of the amount of such payment.

APPENDIX E — RELEVANT SECTIONS OF NEW YORK CODES, RULES AND REGULATIONS

20 N.Y.C.R.R. § 590.70

LIABILITY OF PARTIES AND REFUNDS

590.70 Transferee Liability. [Tax Law, § 1447(3)]

(a) *Tax Paid in Installments.*

Question: If the tax is paid in installments, does the transferee have any liability for the failure of the transferor to pay each installment as it becomes due?

Answer. Yes. The transferee's obligation to withhold consideration from the transferor, equal to the amount of the tentative assessment, or to post a bond, continues until the total tax due from the transferor is paid, whether paid in installment or otherwise. If the transferee fails to comply with the withholding provisions at any time while taxes remain due, the transferee exposes himself to a potential personal liability up to the amount of the tentative assessment.

If a transferor falls to make an installment payment when due, the State Tax Commission may declare the entire unpaid balance due and owing. In such a case, the amount required to be withheld by the transferee (or the bond posted by the transferee) is available as a source of payment of the taxes due. If the transferee failed to withhold, or failed to post the bond, the transferee would be personally liable for the taxes due, up to the amount of the tentative assessment. If the transferee has not withheld, nor posted a bond, but instead

has paid the installment tax payments when due directly to the Tax Commission, the personal liability of the transferee is the amount of the tentative assessment less the payments the transferee has made to the Tax Commission. These rules on transferee liability apply similarly to any instance where installment payment of the tax is authorized by section 1442 of the Tax Law, including purchase money mortgages and leases.

(b) *Question*: When the required forms have been properly filed and a tentative assessment issued, is the transferee subject to personal liability for the transferor's failure to pay the tax?

Answer. Yes. Whether or not a document is recorded for the transfer, the transferee is required by section 1447(3)(a) of the Tax Law to withhold consideration from the transferor in an amount equal to the taxes stated in the tentative assessment, or to post a bond in such amount, until the tax stated in the tentative assessment is paid. If the transferee fails to so withhold consideration or to post a bond, the transferee is personally liable for any tax stated in the tentative assessment that is not paid.

(c) *Question*: Does section 1447(3)(a) of the Tax Law also subject the transferee to personal liability for the gains tax where the transferor failed to file a required questionnaire or affidavit?

Answer. No. Pursuant to section 1447(3)(a) of the Tax Law, the transferee is subjected to personal liability only for the transferee's failure to file a required questionnaire or

affidavit, or for the transferee's act of supplying willfully false or fraudulent information on such documents.

* * *

20 N.Y.C.R.R. § 590.72

§ 590.72 Transferee liability. [*Tax Law, § 1447(3)*]

(a) *Tax paid in installments.*

Question: If the tax is paid in installments, does the transferee have any liability for the failure of the transferor to pay each installment as it becomes due?

Answer: Yes. The transferee's obligation to withhold consideration from the transferor, equal to the amount shown on the tentative assessment, or to post a bond with the Commissioner of Taxation and Finance, continues until the total tax due from the transferor is paid including those instances where the tax is being paid in installments. If the transferee fails to comply with the withholding provisions at any time while taxes remain due, the transferee is exposed to a personal liability to the extent the tax stated to be due in the tentative assessment remains unpaid.

If a transferor fails to make an installment payment when due, the Commissioner of Taxation and Finance may declare the entire unpaid balance due and owing. In such a case, the amount required to be withheld by the transferee (or the bond posted by the transferee) is available as a source of payment of the taxes due. If the transferee failed to withhold, or failed

to post the bond, the transferee is personally liable for the taxes due, to the extent the tax stated to be due in the tentative assessment remains unpaid. If the transferee has not withheld, nor posted a bond, but instead has paid the installment tax payments when due directly to the Commissioner of Taxation and Finance, the personal liability of the transferee is the amount of the tentative assessment less the payments the transferee and transferor have made to the Commissioner of Taxation and Finance. These rules on transferee liability apply to any instance where installment payment of the tax is authorized by section 1442 of the Tax Law, including purchase money mortgages and leases.

(b) *Question*: When the required forms have been properly filed and a tentative assessment issued, is the transferee subject to personal liability for the transferor's failure to pay the tax?

Answer: Yes. Except as provided in subdivisions (d)-(f) of this section, whether or not a document is recorded for the transfer, the transferee is required by section 1447(3)(a) of the Tax Law to withhold consideration from the transferor in an amount equal to the taxes stated in the tentative assessment, or to post a bond with the Commissioner of Taxation and Finance in such amount, until the tax stated in the tentative assessment is paid. If the transferee fails to so withhold consideration or to post a bond, the transferee is personally liable for any tax stated in the tentative assessment that is not paid.

(c) *Question*: Does section 1447(3)(a) of the Tax Law also subject the transferee to personal liability for the tax where the transferor failed to file a required questionnaire?

Answer. No. The transferee is not subjected to personal liability for the tax due to the transferor's failure to file the required questionnaire. Except as provided in subdivisions (d)-(f) of this section, the transferee is subjected to personal liability only for the transferee's failure to file a required questionnaire, or for the transferee's act of supplying willfully false or fraudulent information on such documents or for failure to withhold consideration from the transferor in an amount equal to the tax shown on the tentative assessment and return or to post a bond with the Commissioner of Taxation and Finance for such amount.

(d) *Question*: Is the transferee in the case of a transfer pursuant to a mortgage foreclosure, including such a transfer by a debtor in bankruptcy and any action governed by the Real Property Actions and Proceedings Law, such as the enforcement of a mechanics' lien pursuant to article 3 of the Lien Law, subject to any personal liability for taxes determined to be due from the defaulting mortgagor/debtor?

Answer: No. Section 1447.3(b)(1) of the Tax Law specifically exempts a transferee in an action to foreclose a mortgage from personal liability and does not forbid the transferee from transferring the consideration to the person conducting the foreclosure sale. Also, pursuant to the provisions of section 1447(1)(f)(1) of the Tax Law, a recording officer may record a conveyance resulting from an action to foreclose a mortgage without a statement of tentative assessment and return or affidavit. For purposes of the provisions of this subdivision, an action to foreclose a mortgage includes any action governed by the Real Property Actions and Proceedings Law such as the enforcement of a mechanics' lien pursuant to article 3 of the Lien Law.

(e) *Question*: Is a cooperative housing corporation, or other secured party or secured creditor, as transferee, subject to transferee liability, in the case of a transfer of real property pursuant to any action, proceeding, or an enforcement of rights to enforce a lien, security interest or other rights on or in such shares or other ownership interests evidenced by stock certificates or other instruments, and/or a leasehold evidenced by a proprietary lease, or either of the foregoing, including a transfer by a debtor in bankruptcy, to a secured creditor?

Answer: No. Section 1447.3(b)(2) of the Tax Law, as amended by chapter 172 of the Laws of 1992, specifically exempts a cooperative housing corporation, secured party or creditor as transferee, from transferee liability, in the case of the transfer of shares of stock in a cooperative housing corporation or of other ownership interests in entities (*e.g.*, shares of stock in a corporation or a partnership interest) with an interest in real property that result in a transfer of real property (*i.e.*, the transfer or acquisition of a controlling interest in an entity with an interest in real property) pursuant to such an action as described in this subdivision.

The relief from transferee liability as described in this subdivision is also applicable in the case of such transfers to a party named to act on behalf of the secured party or creditor. For example, if the stock or partnership interest is transferred from a defaulted obligor, as transferor, to a wholly owned subsidiary of the secured party or creditor, as transferee, in full satisfaction of the debt, the wholly owned subsidiary would be relieved of transferee liability to the extent that the exemption provided in section 1443.5 of the Tax Law

would apply to a transfer of real property from the secured party or creditor to such wholly owned subsidiary.

The relief from transferee liability as described in this subdivision, applies to transfers of shares of stock in a cooperative housing corporation, other-ownership interests in entities, and leaseholds evidenced by proprietary leases that occur on or after June 16, 1992 and before February 1, 1995.

(f) *Question*: Is a mortgagee, lienor, cooperative housing corporation, secured creditor or other secured party, as transferee, subject to any transferee liability, in the case of a transfer of real property in lieu of foreclosure, or in lieu of the enforcement of a lien, security interest or other rights on or in shares of stock in a cooperative housing corporation or other ownership interests evidenced by stock certificates or other instruments and a leasehold evidenced by a proprietary lease, or either of the foregoing, including a transfer by a debtor in bankruptcy, to a secured creditor?

Answer: No, section 1447(3)(b)(3) of the Tax Law, as amended by chapter 57 of the Laws of 1993, specifically exempts a mortgagee, lienor, a cooperative housing corporation or other secured party or creditor, from transferee liability in the case of such transfers. However, such exemption from transferee liability does not apply to the extent that the mortgagee, lienor, cooperative housing corporation or other secured party is required to pay any sums of money to the transferor for the transfer. Provided however, that the transferee's payment of New York State Real Estate Transfer Tax, New York City Real Property Transfer Tax,

and any other local transfer tax imposed, the transferee's payment of amounts to parties holding liens against the real property in order for the transferee to obtain clear and marketable title to the real property and amounts paid to the Bankruptcy Court to fund a plan of reorganization where such amounts are used for such purpose, shall not give rise to transferee liability. The transferee liability relief described in this subdivision shall not apply where the Commissioner of Taxation and Finance determines that such mortgage, lien, security interest or other rights were created for the primary purpose of effectuating the transferee's ultimate acquisition of the real property or shares or other ownership interests in a transaction which limits or eliminates transferee liability.

The relief from transferee liability as described in this subdivision is also applicable in the case of such transfers to a party named to act on behalf of the mortgagee, lienor, cooperative housing corporation, or secured party or creditor. For example, if the interest in real property is transferred from a defaulted obligor, as transferor, to a wholly owned subsidiary of the secured party or creditor, as transferee, in full satisfaction of the debt and no money is paid to the defaulted obligor, the wholly subsidiary would be relieved of transferee liability to the extent that the exemption provided in section 1443.5 of the Tax Law would apply to a transfer of real property from the secured party or creditor to such wholly owned subsidiary.

* * *

Appendix E

20 N.Y.C.R.R. § 590.9

CONSIDERATION

§ 590.9 Transferee agrees to pay gains tax. [*Tax Law, § 1440(1)*]

Question: If an agreement is negotiated between a transferor and transferee whereby the transferee agrees to pay gains tax for the transferor, does such payment constitute additional consideration to the transferor?

Answer: Yes. The consideration for the transfer is the price paid or required to be paid for the real property or any interest therein, and includes the cancellation or discharge of an indebtedness or obligation. Since the transferor is personally liable for payment of the gains tax, payment of the tax by the transferee constitutes additional consideration to the transferor. The following equation is used to determine the gains tax to be paid: .10 (Selling Price – Original Purchase Price) = .9X. *X* in the equation is the amount of gains tax due when the transferee pays on behalf of the transferor. *Example:* A contracts with B to sell real property to B for $1 million and B is required to pay the gains tax. A's original purchase price for the property is $900,000.

Appendix E

.10 (1,000,000 900,000)	= .9X	
.10 (100,000)	= .9X	
10,000	= .9X	
10,000/.9	= X	
11,111	= X	
Consideration received:		$1,011,111
Less original purchase price:		–900,000
Gain subject to tax:		111,111
Gains tax rate:		x .10
Gains tax due:		$ 11,111

* * * *

APPENDIX F — STATE STATUTES PROVIDING FOR REIMBURSEMENT OF TRANSFER TAXES AND SIMILAR EXPENSES TO CONDEMNEES

STATE	STATUTES
Alabama	Ala. Code 1975 § 18-1A-30 and § 18-4-15
Alaska	AS § 34.60.070
Arizona	A.R.S. § 11-965 and § 28-7145
Colorado	C.R.S.A. § 24-56-114
Delaware	29 Del.C. § 9502
Georgia	GA Code 22-4-6
Hawaii	HRS § 113-2
Maryland	MD Code, Real Prop § 12-209 and § 12-106
Michigan	M.C.L.A. 213.324
Minnesota	M.S.A. § 84.0274
Mississippi	Miss. Code Ann. § 43-37-5
Montana	MCA 70-31-302
New Hampshire	R.S.A. 124-A:6
New Jersey	N.J.S.A. 20: 3-26
New York	McKinney's EDPL § 702
Oklahoma	27 Okl.St.Ann. § 10
Pennsylvania	26 P.S. § 1-608

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South Carolina	Code 1976 § 28-11-30
Tennessee	T.C.A. § 29-16-114
Utah	U.C.A. 1953 § 57-12-5
Virginia	Code 1950 § 25-249
Washington	RCWA 8.26.200
Wisconsin	W.S.A. 32.195
Wyoming	W.S. 1977 § 16-7-115

In addition to the 24 state statutes cited above, Section 211(a) of the Uniform Eminent Domain Code contains a virtually identical section which is based upon Section 303 of the Policies Act.

Supreme Court, U.S.
FILED
MAY 19 2000

(2)

No. 99-1563

In the Supreme Court of the United States

S & M ENTERPRISES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether New York's former "Tax On Gains Derived From Certain Real Property Transfers," N.Y. Tax Law § 1441 (McKinney 1987) (repealed 1996), was a capital gains tax, rather than a transfer tax, and therefore not reimbursable under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4653(1), when the property was acquired by the United States by eminent domain.

2. Whether the Fifth Amendment requirement of just compensation for the taking of private property obligates the government to reimburse a property owner for a state tax assessed on the owner's gain on the transfer of the property.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 199 F.3d 1317. The opinion and order of the Court of Federal Claims (Pet. App. 9a-35a) is reported at 43 Fed. Cl. 210.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1999. The petition for a writ of certiorari was filed on March 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Acting on behalf of the Postal Service, the United States acquired petitioner's interest in certain real property through eminent domain by filing a Declara-

tion of Taking in the United States District Court for the Southern District of New York. Pet. App. 1a-2a, 15a. Petitioner and the United States stipulated that just compensation for the taking was $22,373,051, inclusive of interest. The district court entered a decree which adopted that amount as the just compensation for the property, and the United States paid that amount in its entirety to petitioner. *Id.* at 15a.

In contemplation of the payment of the amount awarded, the New York State Department of Taxation and Finance assessed a tax on petitioner of $958,627.30 under former Article 31-B of the New York State Tax Law, entitled "New York State Tax on Gains Derived from Certain Real Property Transfers." Pet. App. 9a, 15a. That Article provided:

> A tax is hereby imposed on gains derived from the transfer of real property within the state. The tax shall be at the rate of ten percent of the gain.

N.Y. Tax Law § 1441 (McKinney 1987) (repealed 1996) (Pet. App. 44a).[1] The New York statute defined the term "gain" as "the difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price." N.Y. Tax Law § 1440(3) (McKinney 1987) (repealed 1996) (Pet. App. 42a). Based upon the payment of the final award in the condemnation proceeding, and following further administrative proceedings, the NYS Department of Taxation and Finance assessed an additional Article 31-

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[1] The New York statute exempted property from the gains tax "[i]f the consideration [paid] is less than one million dollars." N.Y. Tax Law § 1443(1) (McKinney 1987) (repealed 1996) (Pet. App. 44a).

B tax of $96,350, with interest of $147,636.34 from the date of the taking. Pet. App. 15a-16a.

Petitioner submitted a claim to the Postal Service demanding reimbursement for the Article 31-B tax under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), 42 U.S.C. 4653(1). That statute authorizes reimbursement to the owner of property acquired through condemnation for "recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States." *Ibid.* When the Postal Service denied that claim, petitioner filed this suit in the Court of Federal Claims to obtain reimbursement of the Article 31-B tax. Pet. App. 16a.

2. The Court of Federal Claims granted summary judgment for the government. Pet. App. 9a-35a. The court held that a transfer tax, by definition, is a "tax imposed by states on each deed conveying real estate." *Id.* at 31a (quoting *Black's Law Dictionary* 1498 (6th ed. 1990)). The court further held that an income tax is "a tax on a person's income, * * * profits and the like, or the excess thereof over a certain amount." *Ibid.* (quoting *Black's Law Dictionary* 764 (6th ed. 1990)). The court concluded that, because the Article 31-B tax was imposed upon the gains realized upon the sale of the property, rather than upon the State's cost of the transfer transaction, the Article 31-B tax resembled an income tax, not a transfer tax, and was therefore not reimbursable under the URA. *Id.* at 32a-33a. The court further concluded that the Article 31-B tax was not encompassed within the URA as a "similar expense" to a transfer tax that was "incidental" to the transfer. *Id.* at 33a-34a.

3. The court of appeals affirmed. Pet. App. 1a-8a. The court rejected petitioner's argument that the

Article 31-B tax more closely resembled a reimbursable transfer tax than a non-reimbursable gains tax. The court of appeals determined that, "if the tax is based solely on the *gain*, if any, and not on the *size* of the transfer, it is never a 'transfer tax, or similar expense' and, therefore, never reimbursable under the [URA]." *Id.* at 7a. The court recognized that, "[i]n a case, such as this one, where if there had been a loss incurred in the transfer no New York transfer gains tax would have been due, the tax is solely against the gain, and not against the conveyance, [and] the tax cannot be a 'transfer tax, or similar expense.'" *Ibid.* The court concluded that "[i]t is, instead, merely a tax on the gain, and therefore, not reimbursable." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. When the government takes property by eminent domain, the URA requires reimbursement of "recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States." 42 U.S.C. 4653. The URA is not designed to reimburse an owner for every conceivable expense that might be incurred through the sale of his real property. *Collins* v. *United States*, 946 F.2d 864, 868 (Fed. Cir. 1991); 116 Cong. Rec. 40,168-40,169, 40,171 (1970). In particular, Congress did not intend through the URA to require the government to compensate property owners for taxes on capital gains that may be realized through the condemnation. *Collins* v. *United States*, 946 F.2d at 868; 42 U.S.C. 4653; 116 Cong. Rec. at 40,168-40,169, 40,171.

Petitioner nonetheless claims that the New York Article 31-B tax is reimbursable under the URA on the theory that it constituted a "transfer tax" or "similar expense," rather than a capital gains tax. Because the Article 31-B tax was repealed by New York in 1996, this issue has limited prospective importance. Moreover, all of the courts that have considered the Article 31-B tax have consistently concluded that it was a gains or income tax, not a transfer tax or similar expense. See, *e.g.*, *In re: 995 Fifth Avenue Assocs., L.P.*, 963 F.2d 503, 512, 513 (2d Cir.), cert. denied, 506 U.S. 947 (1992); *National R.R. Passenger Corp.* v. *10,178 Square Feet of Land*, 789 F. Supp. 142, 143 (S.D.N.Y. 1992); *Heller* v. *State*, 611 N.E.2d 770, 771 (N.Y. 1993); *In re Williams*, 188 B.R. 331, 336-337 (E.D.N.Y. 1995); *In re Jacoby-Bender, Inc.*, 40 B.R. 10, 15 (Bankr. E.D.N.Y. 1984), aff'd, 758 F.2d 840 (2d Cir. 1985). And, every court that has considered whether the Article 31-B tax was reimbursable under the URA, or under a similar New York State statute providing for reimbursement of transfer taxes, has concluded that it is not. Pet. App. 7a-8a; *National R.R.*, 789 F. Supp. at 143; *Heller* v. *State*, 611 N.E.2d at 771. These uniform decisions are based on the plain language of the applicable statutes: the state tax was "imposed on *gains* derived from the transfer of real property," not upon the transfer itself. N.Y. Tax Law § 1441 (McKinney 1987) (repealed 1996) (emphasis added); see Pet. App. 5a-8a.

Petitioner asserts that the Article 31-B tax was a transfer tax because the State ordinarily required the tax to be paid before permitting a deed to be recorded. As the New York courts have held, however, the timing of the payment served merely as a mechanism to ensure collection; it did not convert the Article 31-B tax on capital "gains" into a "transfer tax." *Heller* v. *State*,

585 N.Y.S.2d 579, 581 (1992), aff'd, 611 N.E.2d 770 (1993). Moreover, the state law did not actually require the transferor to "pay" the tax before recording the deed. Instead, the transferor was required only to make a deposit of a "tentative assessment of the amount of tax" that was anticipated ultimately to be due. N.Y. Tax Law § 1447(f)(1)(i) (McKinney 1987) (Pet. App. 46a); *Heller* v. *State*, 611 N.E.2d at 772.[2]

Because the state tax is imposed on the "gain" derived from the transfer of the property, the courts below correctly held that it does not fall within the scope of reimbursable expenses under the URA. There is no conflict among the courts nor other reason warranting further review of that holding in this case.

2. Petitioner also asserts that, assuming that the URA does not provide reimbursement for the Article 31-B tax, petitioner "has been denied just compensation to the extent that its net recovery as a result of the condemnation has been reduced by the amount of the transfer gains tax it is out-of-pocket." Pet. 22. It does not appear that petitioner properly preserved this argument before the trial court. The contention was not raised or discussed in any of the briefing prior to entry of judgment in the trial court. Because the court of appeals also did not address petitioner's new con-

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[2] In any event, no deed is involved in a federal condemnation under the Declaration of Taking Act, 40 U.S.C. 258a. Since recording is not necessary to perfect the government's right of title to the real property, the Article 31-B tax can not represent a "transfer tax" incidental to "conveying such real property to the United States." *Collins* v. *United States*, 946 F.2d at 869. New York has an actual transfer tax, entitled the "Real Estate Transfer Tax Law," which is separate and distinct from the Article 31-B tax. See N.Y. Tax Law §§ 1400-1410 (McKinney 1987). This further confirms that the Article 31-B tax is a gains tax, not a transfer tax.

tention in its published decision in this case, this case creates no binding precedent on the issue that petitioner now seeks to raise.

It is, in any event, settled that the proper measure of just compensation for the taking of private property is "the fair market value of [the] property at the time of the taking." *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 474 (1973). "And this value is normally to be ascertained from 'what a willing buyer would pay in cash to a willing seller.'" *Ibid.* (quoting *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 633 (1961)). In the district court proceedings that preceded the filing of this case, petitioner stipulated to an amount of just compensation for the taking of its property that did not include the amount that petitioner now seeks. Pet. App. 15a.

Petitioner argues that, despite its binding stipulation, it is entitled to receive an amount *greater* than the fair market value of its real property. That contention is frivolous, however, for the Court of Federal Claims lacks jurisdiction to award judgment for just compensation, or to increase a just-compensation award, when the property was taken pursuant to a final award entered in a district court condemnation proceeding. *Dominion Smelting & Refining Corp.* v. *United States*, 102 Ct. Cl. 281, 284 (1944); 28 U.S.C. 1345, 1358, 1403. Moreover, the Article 31-B tax was imposed solely by New York, without any involvement by the federal government, and no recovery could be required from the United States for that alleged "taking." See, *e.g.*, *Lenoir* v. *United States*, 222 Ct. Cl. 499, 500 (1979); *Edison Sault Elec. Co.* v. *United States*, 552 F.2d 326, 333 (Ct. Cl. 1977).

It is, in any event, well established that "compensation under the Fifth Amendment may be recovered

only for property taken and not for incidental or consequential losses." *R.J. Widen Co.* v. *United States*, 357 F.2d 988, 994 (Ct. Cl. 1966); see *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377-778 (1946). The gains tax imposed by New York upon the transferor in a federal condemnation is precisely such an unintended incident of the taking. *Ibid.* Petitioner's entitlement to just compensation for the taking of its property means payment for the "fair market value" of that property, not reimbursement for the state capital gains taxes that any transferor of the property must pay.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2000

Supreme Court, U.S.
FILED
MAY 30 2000
CLERK

(3)

No. 99-1563

IN THE

Supreme Court of the United States

S&M ENTERPRISES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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Petitioner, S&M Enterprises ("S&M"), submits this reply brief to correct two serious misstatements of the record by the Government in its brief in opposition. Contrary to the Government's contentions, petitioner preserved its claims under the just compensation clause of the Fifth Amendment for reimbursement of the New York State real property transfer gains tax it has paid. S&M also replies to several arguments in the Government's brief in further support of petitioner's position that the transfer gains tax is a transfer tax or similar expense within the meaning of the Uniform Relocation Assistance and Real Property Acquisition Policies Act ("Policies Act"), 42 U.S.C. § 4653(1).

REASONS FOR GRANTING THE WRIT

I.

PETITIONER PRESERVED ITS FIFTH AMENDMENT CLAIM. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER THE GOVERNMENT IS REQUIRED TO REIMBURSE S&M FOR THESE TAXES UNDER THE FIFTH AMENDMENT.

The Government contends that: (i) petitioner did not preserve its Fifth Amendment claim before the Court of Federal Claims; and (ii) the final award entered as a consent judgment in the district court condemnation proceeding precluded petitioner from pursuing a Fifth Amendment claim in the Court of Federal Claims. (Government's Brief In Opposition, pp. 6-7). Both contentions are without merit.

The Government is incorrect in alleging that S&M did not raise or discuss its Fifth Amendment claim in the Court of Federal Claims. The claim was asserted in S&M's first

amended complaint (Joint Appendix in the United Court of Appeals for the Federal Circuit ("JA") 142-143, ¶¶ 17-18) as well as in its second amended complaint (JA 161, ¶¶ 21-22). In its Reply Memorandum of Law in Further Support of its Cross-Motion for Summary Judgment, dated March 9, 1989, S&M stated:

> Defendant overlooks that the Government has the obligation under the Fifth Amendment of the Constitution to pay "just compensation" to the condemnee. To the extent the Tax is deducted from the condemnation award, Plaintiff is deprived of the full value of its property and hence fair treatment. Contrary to Defendant's assertion, the granting of Plaintiff's claim would not constitute a windfall. Rather, it would mean that the condemnation award would not be diminished by the amount of the Tax. Plaintiff would still remain liable for payment of federal and state income taxes on the gain derived from the condemnation.

(pp. 5-6).

The Court of Federal Claims rejected S&M's Fifth Amendment claim (34a)[1]. Although petitioner argued in support of its Fifth Amendment claim in its brief (pp. 38-40) and reply brief (pp. 23-25) to the Federal Circuit, that court failed to address the issue in its opinion (1a).

---

1. References to the Appendix annexed to S&M's Petition For A Writ Of Certiorari are designated parenthetically as "___a".

The Government's second contention is that "[i]n the district court proceedings that preceded the filing of this case, petitioner stipulated to an amount of just compensation for the taking of its property that did not include the amount that petitioner now seeks." (Government's Brief, p. 7). The Government further contends that "the Court of Federal Claims lacks jurisdiction . . . to increase a just-compensation award, when the property was taken pursuant to a final award entered in a district court condemnation proceeding." *Id.*

The Consent Judgment, however, contained an express reservation of rights to permit the petitioner to pursue its claims in the Court of Federal Claims. The parties agreed: "This judgment of compensation is without prejudice to the condemnee's pursuit of the claims asserted in its action now pending in the Court of Federal Claims for reimbursement of the New York State Transfer gains tax".[2] The reference to "claims" in the plural was deliberate. It was intended to include all petitioner's claims, including its Fifth Amendment claim and its claim that the transfer gains tax is a "transfer tax" or a "similar expense" within the meaning of the Policies Act. Surprisingly, the Government does not refer to the applicable provision of the Consent Judgment quoted above. In sum, petitioner preserved its Fifth Amendment claim.

Should the Court not grant relief under the Policies Act and reach the constitutional issue, petitioner's Fifth Amendment claim presents a significant issue as to the elements of value to be included in determining just compensation. The Government sets forth the general proposition that compensation under the Fifth Amendment

2. A copy of the Consent Judgment is annexed as an exhibit to this reply brief; we have italicized the quoted passage which appears at page 3 of the Consent Judgment.

is payable only for the property taken and not for incidental or consequential losses. An incidental loss, the Government maintains, is "the state capital gains taxes that any transferor of the property must pay" (Government's Brief, p. 8). The Government overlooks that in addition to the transfer gains tax, which is the subject of this case, New York State has a capital gains tax. Petitioner acknowledges its liability to pay both the federal and state capital gains taxes although both jurisdictions have provided for deferral of payment (S&M's Petition for A Writ Of Certiorari, p. 19). Because the transfer gains tax is not a capital gains tax, it is not afforded this treatment.

The Government has also not responded to the fact that in a voluntary transaction, the seller has the right to negotiate and have the buyer pay the transfer gains tax as part of the arm's-length bargaining to determine the purchase price. Ordinarily the price agreed to between a willing buyer and a willing seller is the best evidence of fair market value. In condemnation, a forced sale, the condemnee is deprived of this right. The loss of this right to negotiate and to have the buyer pay the transfer gains tax, we submit, is an element of value for which the condemnee is entitled to compensation. See *United States v. 1,291.83 Acres of Land*, 411 F.2d 1081, 1084 (6th Cir. 1969). The case at bar raises an important issue as to which costs incident to a condemnation are compensable under the Fifth Amendment.

II.

THE NEW YORK STATE TRANSFER GAINS TAX IS A TRANSFER TAX OR A SIMILAR EXPENSE WITHIN THE MEANING OF THE POLICIES ACT.

We respond to several arguments advanced by the Government which were not addressed in the Petition for Certiorari.

1. The Government contends that since no deed is involved in a federal condemnation under the Declaration of Taking Act, 40 U.S.C. § 258a, and a recording is not necessary to perfect the Government's right of title to the real property, the transfer gains tax does not satisfy the statutory requirement of "transfer taxes, and similar expenses incidental to conveying such real property to the United States," 42 U.S.C. § 4653(1) (Government's Brief, p. 6, n.2). The argument is unconvincing. The Government's argument addresses the power of the federal government, not the nature of the transfer gains tax. The federal government unquestionably possesses the power to acquire title to real property under 40 U.S.C. § 258a without following state law requirements governing property title transfer and the recording of deeds. The exercise of that power, however, does not alter the essential nature or character of any transfer taxes that apply to transfers of title under state law.

If the Government's argument were correct, no transfer tax would be reimbursable under the Policies Act, a result that would be squarely at odds with the statute. A federal condemnee is exempt from payment of the traditional New York State transfer tax. N.Y. Tax Law § 1405. But assume the condemnee were not exempt. The Government could not

seriously contend that a condemnee should not be reimbursed for payment of that transfer tax because the Government acquired title under the Declaration of Taking Act and did not record the transfer. The Government's argument would negate the purpose of the Policies Act of providing protection to the condemnee. Quite simply, the Government's decision to proceed under the Declaration of Taking Act or in some other manner does not alter the nature of the transfer gains tax.

2. The Government argues that the requirement that the transfer gains tax be paid before the deed would be recorded (S&M's Petition, pp. 14-15) "served merely as a mechanism to ensure collection; it did not convert the Article 31-B tax on capital 'gains' into a 'transfer tax' " (Government's Brief, p. 5). Here, too, the Government's argument is not persuasive. Both a traditional transfer tax and the transfer gains tax have the same essential characteristic — the tax is required to be paid at the time of transfer as a prerequisite for the recording of the deed. This characteristic is both an essential element of both taxes as well as a mechanism for their enforcement. The taxes are determined on the basis of a single transfer. By contrast, a capital gains tax is computed on the aggregate of the taxpayer's various gains and losses during the taxable period and is payable following the close of the taxpayer's tax year when the tax return is due. Only the transferor is liable for the gains tax whereas both the transferor and under some circumstances the transferee are liable for payment of the transfer gains tax.

In sum, the transfer gains tax and the traditional transfer tax have the same predominant characteristics in distinction to the capital gains tax. Thus, the transfer gains tax is a transfer tax or an expense similar to a transfer tax within the

meaning of the Policies Act. Through the use of the plural — "transfer taxes" and "similar expenses" — the Policies Act contemplates that a jurisdiction may have more than one transfer tax. Here, New York State has two transfer taxes, one computed on the amount of the transfer and the other computed on the amount of the gain.

3. The Government contends that the transferor was required only to pay a "tentative assessment" at the time of transfer (Government's Brief, p. 6). This argument overlooks that the New York State Department of Taxation and Finance established an elaborate pre-transfer audit procedure in accord with § 1447 of the N.Y. Tax Law (S&M's Petition, pp. 13-14). The amount determined after the pre-transfer audit was required to be paid before recordation of the deed. The significant fact is that the tax, whether it be a tentative assessment or the full amount, was required to be paid at the time of transfer of the particular property.

Furthermore, the amount of the tax was determined as of the date of transfer. Thus, interest on the amount of the tax not paid by the date of transfer ran from the date of transfer. Also, the assessment was not tentative in that subsequent events would determine the amount of the tax. The amount of the tax was calculated based upon the consideration paid or owing on the date of transfer of title. Even if a subsequent event were to diminish the value of the property, such as a buyer's failure to pay a purchase money mortgage, it would not affect the amount of the tax or entitle the transferor to a refund.[3]

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3. *In re 31/32 Lexington Assoc. v. Tax Appeals Tribunal*, 258 A.D.2d 684, 685 N.Y.S.2d 329 (3d Dept.), *appeal dismissed*, 93 N.Y.2d 919, 713 N.E.2d 418, 691 N.Y.2d 383 (1999); (Cont'd)

4. The Government does not deny that federal agencies on a fairly regular basis deal with administrative claims seeking compensation under the transfer tax and similar expense provisions of the Policies Act. Nor does the government respond to the point that at least 24 states have adopted legislation modeled on the Policies Act and provide for the condemnor to reimburse the condemnee for transfer taxes and similar expenses incidental to the condemnation. (50a). Both the construction of the Policies Act and, if necessary, the Fifth Amendment claim merit determination by this Court to assure that condemnees receive fair and equitable treatment from the Government.

(Cont'd)

In re Brockman v. Tax Appeals Tribunal, 238 A.D.2d 693, 694, 656 N.Y.S.2d 429, 430-31 (3d Dept. 1997); *In re South Suffolk Recreation Ventures v. Tax Appeals Tribunal*, 224 A.D.2d 874, 875, 638 N.Y.S.2d 515, 516 (3d Dept.), *leave to appeal denied*, 88 N.Y.2d 803, 668 N.E.2d 417, 645 N.Y.S.2d 446 (1996); *In re Wanat v. Tax Appeals Tribunal*, 224 A.D.2d 873, 874, 638 N.Y.S.2d 251, 252 (3d Dept.), *leave to appeal denied*, 88 N.Y.2d 803, 668 N.E.2d 417, 645 N.Y.S.2d 446 (1996).

CONCLUSION

For all the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Federal Circuit to review the important federal questions here presented and, following such review, reverse the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX — CONSENT JUDGMENT DATED JULY 26, 1993 AND FILED JULY 29, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

87 Civ. 4635 (MBM)

#93,1790

UNITED STATES OF AMERICA,

Plaintiff,

-against-

17,380 SQUARE FEET OF LAND SITUATED IN THE COUNTY OF NEW YORK, STATE OF NEW YORK; S & M ENTERPRISES; MANUFACTURER'S HANOVER TRUST CO.; VAN WAGNER ADVERTISING CORP.; THE CITY OF NEW YORK; AND UNKNOWN OTHERS,

Defendants.

CONSENT JUDGMENT

WHEREAS, the attorneys for the United States of America (the "Government") and defendant S & M Enterprises have orally stipulated to, and the Court has adopted, the following findings of fact and conclusions of law:

1. The Government filed a complaint in condemnation on June 29, 1987, at the request of the United States Postal Service, pursuant to 40 U.S.C. §§ 257 and 258(a).

2. The Government thereby acquired by eminent domain the property located at Block 918, Lot 6 and known as 207-213 East 36th Street and 204-208 East 37th Street, New York, New York (the "property"). A legal description of the property is annexed hereto as Exhibit A. The property consists of 17,380 square feet of land improved with a five-story commercial warehouse building of 103,424 square feet with entrances on both 36th and 37th Streets, 100 feet east of Third Avenue.

3. Immediately prior to the condemnation, the property was owned by the defendant S & M Enterprises (the "condemnee").

4. On June 29, 1987, simultaneously with the filing of the complaint in condemnation, the Government deposited the sum of $15,300,000.00 in the Registry of the Court as estimated just compensation for the property. Pursuant to a Court order dated August 25, 1987, the Court paid out $13,300,000.00 of that amount to the condemnee. The remaining $2,000,000.00, with interest, was paid to the condemnee pursuant to order of the Court, dated February 26, 1988. *United States v. 17,380 Square Feet of Land*, 678 F. Supp. 443 (S.D.N.Y. 1988).

5. This proceeding has been regularly conducted and all necessary parties to this action have been served.

6. The trial in this case took place on April 19-22, 1993.

7. The Government and the condemnee have stipulated and agreed to the amount of just compensation for the subject property.

8. The Government has the right to condemn the property for public use.

NOW, therefore, upon the agreement of the parties,

IT IS ORDERED, ADJUDGED AND DECREED that the just compensation payable by the United States for the taking of the fee simple absolute title to the property is the sum of TWENTY-TWO MILLION THREE HUNDRED SEVENTY-THREE THOUSAND FIFTY-ONE DOLLARS ($22,373,051.00), inclusive of interest, and judgment is hereby entered against the United States of America in the aforesaid amount. This judgment of compensation includes and finally resolves all claims raised by the condemnee in this action, including, without limitation, the condemnee's claim for compensation for the right to maintain an advertising sign on the eastern wall of the building on the property. *This judgment of compensation is without prejudice to the condemnee's pursuit of the claims asserted in its action now pending in the Court of Federal Claims for reimbursement of the New York State transfer gains tax.*

The United States has partially satisfied this judgment by and to the extent of its previous payment of $15,300,000.00, which the condemnee has already received. The fee simple absolute title to the above-described tract of land shall vest in the United States free and discharged of all claims and liens of every kind whatsoever upon payment of the sum of SEVEN MILLION SEVENTY-THREE THOUSAND FIFTY-ONE DOLLARS ($7,073,051.00) to the condemnee.

IT IS ALSO ORDERED AND ADJUDGED that the said estates and interests are hereby condemned and taken for the use of the United States of America as authorized by law.

IT IS FURTHER ORDERED that the oral stipulation of the parties is in all things ratified, confirmed and adopted as the judgment of compensation in this case.

The United States of America will pay the sum of SEVEN MILLION SEVENTY-THREE THOUSAND FIFTY-ONE DOLLARS ($7,073,051.00) to the condemnee by check payable to S & M Enterprises or by electronic wire transfer to a bank account designated in writing to the attorneys for the United States by the attorneys for S & M Enterprises. If payment is not made on or before July 30, 1993, interest will continue to run on the amount in accordance with 40 U.S.C. § 258e-1 from July 31, 1993 until payment. The applicable rate of interest from June 29, 1993 through June 28, 1994 shall be 3.54 percent per annum calculated on the principal amount of $7,051,163.00, or $683.87 per day.

The Clerk of the Court shall close the file in this case upon entry of this judgment.

The Court retains jurisdiction to make and enter such further orders and judgments as may be necessary and proper.

The entry of the above order is consented to by the undersigned.

Dated: New York, New York
July 26, 1993

Appendix

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